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No. 841

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

Nos. and

EASTERN AIR LINES, INC.,

Petitioner,

v.

UNION TRUST COMPANY, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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EASTERN AIR LINES, INC.,

Petitioner,

v.

UNION TRUST COMPANY, *et al.*,

Respondents.

To the Honorable Earl Warren, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Eastern Air Lines, Inc., defendant in the District Court, prays that a writ of certiorari be issued to review the judgments of the United States Court of Appeals for the District of Columbia Circuit (Nos. 11,991 and 11,992) which upon remand from this Court affirmed judgments of the United States District Court for the District of Columbia.

Prior Decisions of this Court and Opinions Below

Prior decisions of this Court in these cases are reported in 350 U. S. 907 and 350 U. S. 962 and are appended hereto (App. pp. 38a-39a).[1] The original opinion of the

[1] Record and other references appear in parentheses as follows: The Joint Appendix in the Court of Appeals which consists of 11 volumes, is designated by "JA", the volume thereof is designated by Roman numeral and page number thereof by arabic numeral, thus "IJA 50" refers to page 50 of the first volume of the Joint Appendix. The references "App. p. " are to the separately bound appendix filed with this petition.

Court of Appeals is reported in 221 F. 2d 62; 95 U. S. Appeals D. C. 189. The opinion of the Court of Appeals after remand from this Court is reported in 239 F. 2d 25, — U. S. App. D. C. —. Both opinions of the Court of Appeals are appended hereto (App. pp. 1a-38a and 40a-54a). The opinion of the District Court in the companion Tort Claims Act cases is reported in 113 F. Supp. 80 and is also appended hereto (App. pp. 55a-66a).

Jurisdiction

The judgment of the Court of Appeals which reversed the District Court judgment and granted petitioner a new trial was entered on February 8, 1955. Petitions for the rehearing of that judgment by the Court of Appeals en banc, and by the original division, filed by respondents, were denied on April 15, 1955 and May 11, 1955, respectively. Thereafter, on petition of the present respondents, this Court granted certiorari and reversed the judgment of the Court of Appeals on December 5, 1955 (350 U. S. 907). Thereafter this Court entertained the present petitioner's petition for rehearing, and reopened and modified its order of December 5, 1955 and remanded the case to the Court of Appeals to permit that Court to pass on the several issues left undecided (350 U. S. 962). Thereafter on September 20, 1956 the Court of Appeals (Wilbur K. Miller, Circuit Judge dissenting) passed upon the remanded issues and affirmed the judgment of the District Court (239 F. 2d 25; App. p. 40a). A petition for rehearing to that Court, timely filed, was denied on January 7, 1957. Jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Is publication in the Federal Register of a purported substantive federal regulation, which imposes civil and penal sanctions, necessary to give existence and validity to such purported regulation under the Administrative Procedure Act as decided by the Court of Appeals for the Ninth Circuit;[2] or is such publication unnecessary as decided by the Court of Appeals for the District of Columbia in the judgment below?

2. Did the Approach and Landing Pattern of the Washington National Airport which was never published in the Federal Register, either before or after its purported adoption, become a valid and binding Federal Regulation justifying a jury instruction that an airplane's departure from such pattern would constitute negligence *per se*?

3. Where the *jury* case against petitioner Eastern and the *non-jury* case against the United States were tried simultaneously on the same record, and the District Court in the non-jury case made a finding of fact (that Eastern's DC-4 *was* cleared to land) exactly contrary to the jury finding (that Eastern's DC-4 was *not* cleared to land), in view of such an extraordinary conflict, did the District Court's refusal to set aside the verdict and grant Eastern a new trial constitute an abuse of discretion (as the dissenting opinion below concluded) especially in view of the

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[2] *Hotch* v. *U. S.* (1953), 208 F. 2d 244; rehearing 208 F. 2d 249; second rehearing (1954) 212 F. 2d 280.

numerous other defects and anomalies disclosed by the record, including the jury's exoneration of the Bolivian pilot who, flying blind, struck the DC-4 from above and behind without ever having seen it; and the statement of the majority of the Court of Appeals "that the verdicts were *not so clearly* against the weight of the evidence or *so plainly* the result of passion, prejudice and sympathy, *or otherwise so unjust* that the trial judge can be said to have abused his discretion in refusing to grant a new trial".

Statutes and Regulations Involved

The Administrative Procedure Act, 60 Stat. 237, as amended, 5 U. S. C. 1001 et seq.; the Federal Register Act, 49 Stat. 500, as amended, 44 U. S. C. 301 et seq., the Washington National Airport Act, District of Columbia Code, § 7-1301-1307; Washington National Airport Regulations 14 Federal Register 6247, 14 CFR 570.55; and the Air Traffic Rules 14 CFR Pt. 60, both as of November 1, 1949. The relevant provisions of these statutes and regulations appear in the Appendix of this petition.

Statement of the Case

At 11:46 a. m. on November 1, 1949, a clear bright day, an Eastern Air Lines DC-4 passenger transport plane, on a regularly scheduled flight, with 51 passengers and a crew of 4 was about to land on runway No. 3 at the Washington National Airport. It was on final approach and 300 feet from the ground when it was struck from *above* and *behind* by a high speed P-38 military plane owned by

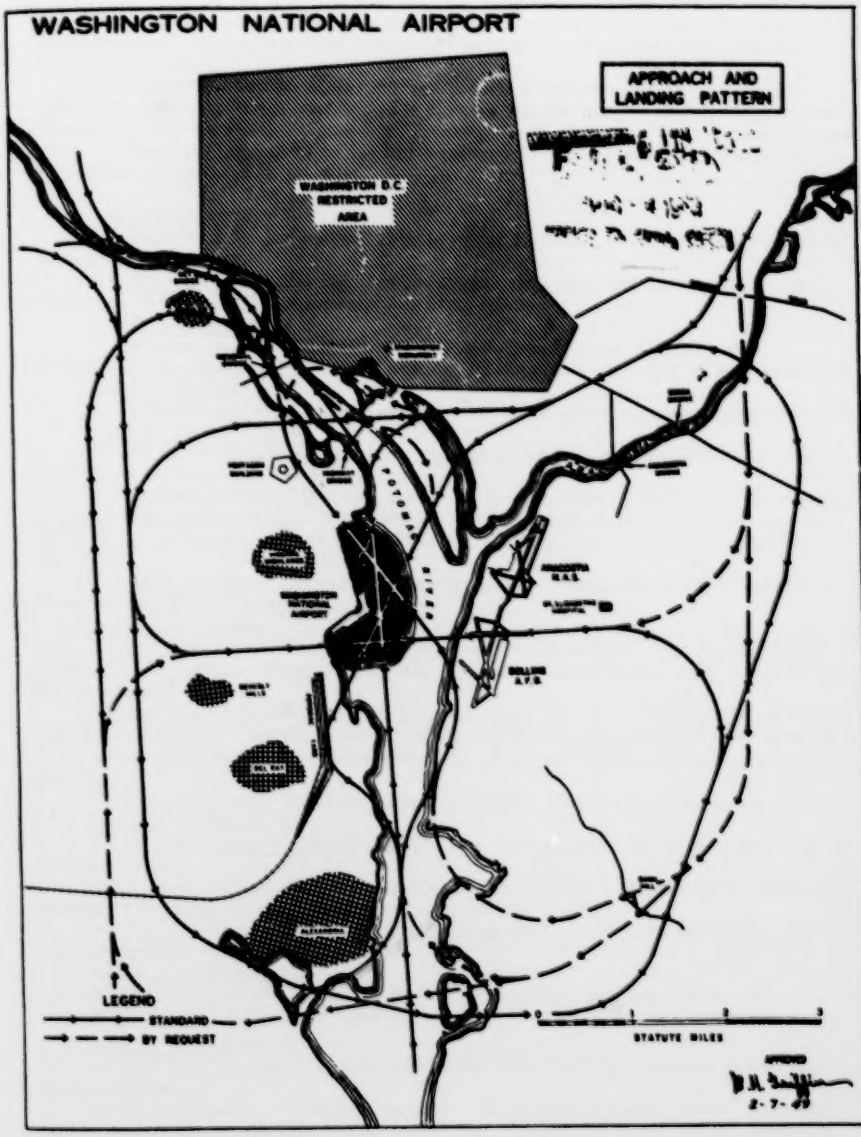
the government of Bolivia and operated by Eric Rios Bridoux, a Bolivian army pilot. The left propeller of the P-38 cut through the fuselage of the DC-4 just aft of the wings, cutting the DC-4 in two. All aboard the Eastern plane were killed. The Bolivian pilot, the only survivor of the disaster, admitted from the witness stand that he had engine trouble and was in a hurry to land, and that he was flying blind—viz, the visual obstructions of the P-38 cockpit so limited his vision that he never saw the airliner which he struck down. The structural expert of the Civil Aeronautics Board found that the landing gear of the P-38 had crashed through the roof of the DC-4, leaving red paint marks from the belly tanks of the P-38 on the top of the fuselage of the DC-4. The jury, nevertheless, exonerated the Bolivian.

Numerous Tort Claims suits were brought against the Government on the grounds that the air traffic controllers in the airport control tower had failed in their duty to separate the planes, and to advise each of the proximity of the other. Numerous death actions were brought against Eastern Air Lines and Bridoux. The main allegation of negligence against Eastern was a claim that the DC-4, in its landing approach, did not fly in accordance with the traffic, or landing pattern, of the Washington National Airport. Two cases were selected for trial and were stipulated to control all others on the issues of liability, and locus of the accident viz, whether the collision occurred in Virginia (death limit $15,000) or in the District of Columbia (recovery for death unlimited). The non-jury Tort Claims Act cases were tried to the District Judge simultaneously with, and in the presence of, the jury to which the cases against Eastern and Bridoux were tried.

The so called traffic, or landing and approach, pattern was contained in Ex. 7 (XI JA 2128-3, 2128-4), and for the convenience of the Court it is reproduced at page 7 hereof. It was primarily for noise abatement (IV JA 853; VII JA 1518; VIII JA 1653; IX JA 1832), and consisted of certain lines drawn over a map of the airport and vicinity, purporting to show the general flight paths for planes landing on, and taking off from, the various runways, together with printed directions. For landing on Runway 3 it shows a southerly path, partially parallel to the runway, to an area south of Alexandria, Va. That was the "downwind leg"; then a 90° turn east until over the Potomac. That was the "base leg"; then a turn northerly over the river culminating in an "S" turn to line up with the 30° heading of Runway 3. This pattern was never published in the Federal Register either before or after its adoption, although the traffic patterns for LaGuardia and Idlewild Airports in New York and Newark Airport in New Jersey had been duly published in 14 FR 479; nor was Ex. 7 adopted in accordance with the requirements of the Administrative Procedure Act. It was published in the Airman's Guide, and Eastern was aware of it.

It was stipulated in the pretrial order that on that fateful morning the DC-4 duly reported its approach to the Washington Control Tower in routine manner, and was cleared to enter the traffic pattern for a landing on Runway 3. The DC-4 entered the traffic pattern and followed through on its downwind leg, west of and parallel to Runway 3, but did not go south of Alexandria. Instead it made a circular turn over the Richmond, Fredericksburg & Potomac Freight Yards and lined up on its final approach to Runway 3, and was again back in the pattern, when it was struck by the P-38 at an altitude of 300 feet.

Plaintiffs' Ex. No. 7



Plaintiffs' Ex. No. 7

WASHINGTON NATIONAL AIRPORT
APPROACH AND LANDING TRAFFIC PATTERN

Patterns are designed for landings on each runway under VFR conditions. (Caution Note): Heavy traffic at Anacostia, Bolling, and Andrews Field, and the area between them.

Remain as high as possible over residential areas and descend over water whenever possible. When landing in the Northern Quadrant pass to the south of the City of Alexandria whenever possible. Runway 18-36 will be utilized as much as possible. Takeoff on Runway 21 or landing on Runway 3 will be utilized infrequently, depending on the force of the wind.

Landing on Runway 36

1. Standard left hand pattern remain above 1200' until over the Potomac River and on final approach.
2. (Upon Request) Southwest bound traffic may use right hand pattern. Proceed well to the east of Anacostia and Bolling Fields.

Landing on Runway 3

1. Remain above 1200' until over Potomac River, make approach over Potomac River, make left turn upon passing PEPCO plant, and line up with Runway 3.

Landing on Runway 9

1. Standard left hand pattern remain above 1200' until turning on final approach.

Landing on Runway 15

1. Northwest bound, north bound, right hand pattern remain above 1200' until turning on base leg west of Pentagon.
2. Southwest bound flight may proceed either via east of the Capitol or via the Northwest Passage. Flights to remain above 1200' until east of Capitol or over the river at the Georgetown Reservoir. (Pilots to advise on "in range" report which is desired).
3. (Upon Request) Left turn in may be made - remain above 1200' until on base leg or west of Pentagon.

Landing on Runway 18

1. Northwest bound and north bound - right hand pattern - remain above 1200' until over the Potomac River on base leg. Follow a pattern to the west and north of the Pentagon.
2. Southwest bound flights may proceed either via east of the Capitol or via the Northwest Passage. Flights to remain above 1200' until east of Capitol or over the river at the Georgetown Reservoir. (Pilots to advise on "in range" report which is desired).
3. (Upon Request) Left turn in may be made - avoid restricted area.

Landing on Runway 21

1. Southwest bound - remain above 1200' until pass the Washington National Guard Armory.
2. Southeast bound, northeast bound and north bound - remain above 1200' until turning on base leg or east of Anacostia and Bolling Fields.
3. (Upon Request) Right turn in remaining above 1200' until over the river past Georgetown Reservoir.

Landing on Runway 27

1. Left hand pattern - remain above 1200' until on final approach.
2. (Upon Request) Right hand pattern - for southwest bound flights only.

Landing on Runway 33

1. Left hand pattern - remain above 1200' until on final approach or over the Potomac River.
2. (Upon Request) Right hand pattern - for southwest bound flights. Proceed east of Anacostia and Bolling Fields and remain above 1200' until on final approach.

The Air Traffic Controller in the tower, who was directing Eastern's landing, testified that the DC-4 was exactly where it was supposed to be when it was struck; that he had cleared the DC-4 to land,[3] and that such clearance authorized the airliner to turn and land on the indicated runway. It need *not* follow through in the flight configuration south of Alexandria shown on Ex. 7. The Administrator of Civil Aeronautics at the time of the accident, Mr. Dallas W. Rentzel, was called by the trial court as its own witness to testify whether a clearance to land authorized an airplane in the traffic pattern, to leave the pattern and land on the indicated runway immediately without following through its further configuration. He testified that it did. The testimony of the other controllers in the tower was the same.

Respondents' counsel in his opening to the jury conceded that the DC-4 had been cleared to land prior to the collision, and there was no claim in the pleadings, nor in the pretrial order, that it had not been so cleared. The claim to the contrary did not emerge until the trial was some weeks old.

The traffic pattern, Ex. 7, was admitted into evidence over petitioner's objection and exception, and the trial court instructed the jury that it was a binding Federal Regulation, a breach of which would constitute negligence *per se* (X JA 2109) to which petitioner excepted (X JA 2122). Petitioner's objection, fully argued (IV JA 843-865) was based on the conceded fact that Ex. 7 was not adopted in conformity with the Administrative Procedure Act, and was never published in the Federal Register.

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[3] The tower communicated with the traffic by voice radio, and on various frequencies. The frequency for commercial traffic such as the Eastern plane was 119.1 megacycles. The frequency for military planes, such as the P-38, was different. It was 126.18 megacycles, called the Baker Channel. Neither could hear the other. Even when on the same frequency a plane could not receive or hear while it was transmitting. Its receiver was muted.

The admissibility of Ex. 7, and its character and effect as a binding Federal Regulation, was also presented to and rejected by the Court of Appeals in both of its opinions (221 F. 2d 62; 239 F. 2d 25).

The only evidence that Eastern was not cleared to land was the negative testimony of Lt. Shaw, the co-pilot of a National Airlines' plane, flying into Washington a few minutes behind Eastern. Shaw said *he did not hear* any such clearance on his radio. Another pilot, Captain Ator of American Airlines, was awaiting take off just before the collision. He was waiting because he was told by the tower to hold take off until after the Eastern DC-4 had landed. The Bolivian pilot testified that he was told by the tower that he was No. 2 to land on Runway 3. His radio was on the military frequency, or "Baker Channel" of 126.18 megacycles.

The District Court submitted to the jury, as a question of fact, whether the DC-4 had been cleared to land prior to the collision, and instructed them, as a matter of law, that if it had been cleared to land there could be no violation of the traffic pattern, because such a clearance authorized an airplane to leave the pattern and come in and land as soon as the pilot's judgment and the proper management of the plane dictated (X JA 2114). He further instructed them that once a plane is cleared to land it is entitled to assume that no other plane has been cleared to land on the same runway at the same time, and to assume that all other aircraft in the control zone have been properly separated from it, and do not constitute a collision hazard to it (X JA 2111). Thus the other minor and trifling allegations of fault, such as lookout, right of way, etc. were expressly removed from jury consideration if the DC-4 had been cleared to land. That was so because once the DC-4 was cleared to land even if it saw the P-38, the Air Traffic Rules gave the DC-4

the right of way (14 CFR 60.14), required it to maintain its course and speed (id.), and its reliance on the tower led it to believe no traffic (seen or unseen) was a collision hazard to its tower directed course.

The jury exonerated the Bolivian pilot and returned a verdict against Eastern. Necessarily implicit in that verdict is the finding that the DC-4 was *not* cleared to land. Eastern's motions for judgment n. o. v. and for a new trial were denied; but two months after the jury finding that Eastern was *not* cleared to land, the District Judge in deciding the Tort Claims suits found that Eastern *was* cleared to land (113 Fed. Supp. 80, App. p. 55a), and his finding in this regard was affirmed by the Court of Appeals (221 F. 2d 62, 78) and by this Court (350 U. S. 907). The principal basis for imposing liability on the control tower was the express finding that *it cleared both planes to land on the same runway at the same time;* and that it otherwise failed in its duty properly to separate the traffic, and keep planes advised of the position and movements of other planes (113 Fed. Supp. 80, 84).

Eastern appealed the jury's finding and the Court of Appeals reversed and ordered a new trial (221 F. 2d 62, App. p. 1a). The ground of reversal was that the only evidence the DC-4 was *not* cleared to land was the negative testimony of Lt. Shaw that *he did not hear it;* that Shaw was busily occupied in the task of flying a large commercial transport plane to a landing; that he was not handling its radio; that he could not be attentive at all times; that in any event his radio was muted while his captain was transmitting; and under such circumstances his negative testimony that he did not hear Eastern cleared to land was not sufficient to create a question of fact in the face of the positive and affirmative evidence from the control tower operator that he had in fact cleared Eastern to land. In this regard the Court of Appeals

followed its local law citing *Small* v. *Penn. R. R.*, 65 App. D. C. 112, 80 F. 2d 704, and similar authorities throughout the country. The Court also ruled that Ex. 7 had been properly admitted in evidence, but having ordered a new trial found it unnecessary to pass upon Eastern's new trial motions.

The present respondent then petitioned this Court for certiorari to review that judgment of the Court of Appeals claiming that the Court of Appeals' reversal was an invasion of the jury's province and an impairment of the right of a jury trial. Solely on the petition and brief in opposition this Court (Mr. Justice Frankfurter and Mr. Justice Harlan dissenting from the grant) granted certiorari and in a per curiam decision of December 5, 1955, reversed the judgment of the Court of Appeals (October Term 1955, 350 U. S. 907). Thereafter and on February 27, 1956 this Court granted rehearing, reopened its order of December 5, 1955, and modified the same by remanding the case to the Court of Appeals to permit that Court to pass upon the several issues which it had not previously passed upon (350 U. S. 962).

The issues not previously passed upon by the Court of Appeals were mainly those raised by the District Court's denial of petitioner's motion for a new trial. The grounds were that the denial constituted an abuse of discretion because (1) the manifest and irreconcilable conflict between the Court's fact finding that Eastern *was* cleared to land and the jury's finding that it was *not* cleared to land made the verdict patently inconsistent and contradictory; that both could not be true on the same record, and required that the issue of landing clearance be resolved by a new trial; (2) that further the verdict was *shocking* and *grotesque* in that it held Eastern liable and at the same time exonerated the Bolivian pilot in the face of his own admissions that he was flying his plane in such fashion he never saw the plane which he struck—this demonstrating

that the verdict was based on passion, prejudice and sympathy for the Bolivian pilot; and (3) in that it found, contrary to the physical facts and the accepted expert testimony that the collision occurred in the District of Columbia.

These remanded questions were briefed and argued to the Court of Appeals on remand, and on September 20, 1956 that Court, dividing two to one, rendered a judgment affirming the District Court (239 F. 2d 25).

In its September 20, 1956 opinion written for the Court by the dissenting judge, Wilbur K. Miller (221 F. 2d 62; App. p. 1a) the Court was unanimous in its conclusion that it had the power and duty to reverse and order a new trial if the trial judge had abused his discretion in denying petitioner's motion for a new trial. It was also, as we read the decision, unanimous in its conclusion that the verdict *was in fact* contrary to the evidence, and *was in fact* the result of passion, prejudice and sympathy (221 F. 2d 62, App. p. 1a). But Chief Judge Edgerton and Circuit Judge Fahy felt that the verdict, although contrary to the evidence, and the result of prejudice and sympathy, was *not sufficiently so* to constitute an abuse of discretion on the part of the trial judge in refusing to grant a new trial.

Circuit Judge Miller dissented. He said that the denial of a new trial *was* an abuse of discretion; that it was demonstrable beyond peradventure that the verdict was flagrantly against the great weight of the evidence and that grave injustice would flow from it. He pointed out that from the same evidence which the jury heard, the trial judge found the tower operator had negligently cleared *both* planes to land on the same runway at the same time and found against the United States principally because of that negligence. He also felt that the exonera-

tion of Bridoux stamped the verdict with an unmistakable character of sympathy for him and prejudice to Eastern, and he called attention to the anomaly that petitioner and the United States have *both* been mulcted in damages on contradictory findings on a single fundamental factual issue, and to the miscarriage of justice which has thereby resulted. Judge Miller was unwilling to believe the Court was powerless to right such a wrong. Petitioner's timely petition for rehearing to the Court of Appeals on January 7, 1957 was denied.

The statement of this case would not be complete without reference to another extraordinary conflict presented by the record. The jury on special interrogatory found that the collision occurred over the District of Columbia, where recovery for wrongful death is unlimited. The District Judge adopted that finding in the Tort Claims actions. However the Court of Appeals, because the Government's "acts or omissions" originated in the control tower which is located in the Commonwealth of Virginia (wrongful death limit $15,000), reversed the District Court on this point, Circuit Judge Miller dissenting, and held that under the Tort Claims Act (28 U. S. C. 1346(b)) the ordinary rule of conflicts did not apply and the applicable death statute was that of Virginia. Thus we have another rare and unusual situation. The United States has been held liable because it *cleared* the Eastern DC-4 to land and the law applicable has been held to be that of Virginia. For the same accident and on the same record Eastern Air Lines has been held liable because its plane was *not* cleared to land, and the law applicable has been held to be that of the District of Columbia. The Government's liability for the death of these 51 passengers has been held to be limited by the $15,000 per person. Eastern's liability to the same persons in the same accident has been held to be unlimited.

Since the District of Columbia boundary at this point extends to the western bank of the Potomac (App. pp. 72a-73a) the determination of the locus of the collision turned on whether it happened over land (Virginia) or over water (District of Columbia). The narrowness of the area involved (District Judge's observation at 113 Fed. Supp. 80, 85; App. p. 65a) and the recognized inability of untrained observers to visually measure depth perception in the air against horizontal distance on land or water, made the testimony of the ordinary ground witnesses concededly unreliable, although there was plenty such testimony on both sides. The trained observers in the control tower placed the collision over land. Numerous pieces of wreckage from the DC-4, heavy objects, passengers' effects, etc. fell on land in the Potomac Yard, and on both sides of the Memorial Highway. The DC-4 was going 130 miles per hour and the accepted scientific testimony was that heavy objects, if dropped at such a speed, would continue in the flight path (30°) for 830 feet before they reached the ground. Petitioner claimed that this conceded scientific law, and the stipulated physical facts that heavy objects landed in Virginia, removed any question of fact on this point, and that the jury finding that the collision occurred in the District of Columbia was contrary to physical facts and known scientific law. To justify the jury finding on this point those heavy objects would *have to have flown backward.* The Court of Appeals did not decide this point in its original opinion (221 F. 2d 62), but on June 24, 1955 in response to respondents' motion for clarification, it affirmed the District Court on the "situs" point. Heretofore it has not been possible to raise the point in this Court.

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals erroneously decided a Federal Question of major importance under the Administrative Procedure Act in a manner precisely contrary to the decision of the Court of Appeals for the Ninth Circuit in *Hotch* v. *U. S.*, 208 F. 2d 244, 250; 212 F. 2d 280, and in a manner which aborts the objectives and intents underlying the enactment of the Federal Administrative Procedure Act.

Overruling respondents' contention, both the District Court and the Court of Appeals decided that the Washington National Airport landing pattern (Ex. 7), although not adopted in accordance with the rule making processes specified in the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. A. 1001(c), 1002(a)(3), 1003), and never published in the Federal Register, nevertheless constituted a binding Federal Regulation, breach of which would be negligence *per se* (221 F. 2d 62, 65, 68-69, App. pp. 5a, 10a-13a; 239 F. 2d 25, 28, App. pp. 42a-43a). In so holding, the Court of Appeals decided a question of great public interest and importance, and decided it in exact conflict with the decision of the Ninth Circuit Court of Appeals in *Hotch* v. *U. S.*, 208 F. 2d 244, 250, 212 F. 2d 280.

This question has never been before this Court in this or in any other case. Eastern Air Lines was respondent when this case last came to this Court on certiorari (350 U. S. 907). The judgment of the Court of Appeals reviewed in 350 U. S. 907 had given Eastern a new trial. Consequently Eastern had no right or occasion to request

a review of the question. However the existence of the question was called to the Court's attention in Eastern's rehearing petition, on which a further per curiam order was made herein on February 27, 1956 (350 U. S. 962).

A reproduction of the disputed exhibit (Exhibit 7) appears at page 7 of this petition.[4] It consists of a map of the airport on which certain lines representing flight paths are drawn, accompanied by a page of printed instructions. It is conceded that no part of this exhibit was ever published in the Federal Register either before or after its purported adoption.

In brief the history underlying this exhibit is as follows. The Washington National Airport Act (Act of June 29, 1940, 54 Stat. 686, Ch. 444; District of Columbia Code, §§ 7-1301-1307) established the geographical boundaries of the airport, and placed it under the operation and control of the Administrator of Civil Aeronautics, Sec. 2 (D. C. Code, Sec. 7-1302) who was empowered "to make and amend such rules and regulations as he may deem necessary * * *". Pursuant to this Act the Administrator from time to time published regulations with respect to the Washington National Airport (See 6 FR 5134, effective October 9, 1941; 12 FR 464, effective January 23, 1947 and sections re-designated and renumbered in 13 FR 3047 and 14 FR 38). In 14 FR 5541 (September 9, 1949) the Administrator published in the Federal Register a notice of proposed rule making, giving notice that he intended to revise the regulation pertaining to the Washington National Airport, 14 CFR Part 570, and quoting a proposed revised regulation but *not* quoting the traffic pattern (Ex. 7) either in form or substance; and not making any finding that its publication was dispensed

[4] Ex. 7 consisted of both Landing and Take-off Patterns. Since the Landing Pattern alone is relevant here, we have not reproduced the Take-off Pattern at p. 7 supra.

with in the public interest. Section 570.55 of the proposed regulation read:

> § 570.55. *Landing and take-off rules.*
>
> (a) • • •
>
> (b) • • •
>
> (c) Aircraft landing or taking off shall conform to the air traffic pattern as published jointly in the Airman's Guide by the Anacostia Naval Air Station, Bolling Field and the Washington National Airport" (14 FR 5544).[5]

On October 14, 1949, *seventeen* days before this accident, the regulation was published in definitive form (still without Ex. 7) in the Federal Register for October 14, 1949 (14 FR 6247-6252), with a finding by the Administrator that public interest required it to go into effect immediately, and that the 30 day deferred effectiveness provision of the Administrative Procedure Act was waived. It then became 14 CFR 570, and was published in a supplement to the 1949 Edition of the Code of Federal Regulations.

The Administrative Procedure Act of June 11, 1946, Ch. 324, 60 Stat. 237, 5 U. S. C. 1001 et seq. "is a new basic and comprehensive regulation of (administrative) procedures." *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 36 (1950). It "was framed against a background of rapid expansion of the administrative process as a check upon

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[5] The Airman's Guide is a semimonthly publication of the Department of Commerce printed and distributed by the Government Printing Office to those who buy it. It contains information and data of interest in the field of aviation, and being published at regular intervals it reports current changes. Thus in order to find the traffic pattern for the Washington National Airport, a pilot whether he be a commercial air transport pilot, or an itinerant flyer, would have to have recourse to the numerous issues of the Airman's Guide, and certainly to the latest issue to see if there had been any overnight changes.

administrators whose zeal might otherwise have carried them to excesses in contemplating the legislation creating their offices. *It created safeguards even narrower than the constitutional ones against arbitrary official encroachment upon private rights.*" *U. S.* v. *Morton Salt,* 338 U. S. 632, 644 (1950, our emphasis).

The Administrative Procedure Act became law some 11 years after the Federal Register Act was enacted on June 26, 1935 (49 Stat. 500 et seq., 44 U. S. C. 301-314). The latter Act had its genesis against the now familiar background of the *Hot Oil* case, *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 412; and it required all documents and rules having "general applicability and legal effect" to be published in the Federal Register, 44 U. S. C. 305(a). Even more basically it stipulated that "the original and two duplicates or certified copies" of all documents required to be published must *first* be *filed* with the Federal Register Division of the National Archives Establishment,[6] and "shall be printed and distributed forthwith by the Government Printing Office in the publication designated the 'Federal Register'" (Sec. 303); and "No document required by Section 305(a) to be published * * * shall be valid as against any person who has not had actual knowledge thereof until the duplicate originals * * * shall have been duly filed * * *" (Sec. 307). All required notices of hearing and opportunities to be heard were to be published in the Federal Register not less than 15 days before the hearing, unless the particular statute otherwise specified (44 U. S. C. 308). Any document prescribing a penalty or imposing an obligation is declared to be of "general applicability and legal effect" 44 U. S. C. 305(a)(3); 1 CFR 1.32 Edition of 1949.

Enriched by the experience with the Federal Register

[6] National Archives Establishment was transferred to General Services Administration by Sec. 104(a) of the Act of June 3, 1949, Ch. 288, 63 Stat. 381, 44 U. S. C. 391.

Act, the Congress vastly extended the frontiers of administrative regulation by the Administrative Procedure Act. The administrative rule making process, both substantive and adjective, was now carefully regulated by a statute of general application to all "agencies". No rule could be made, and no sanction imposed, "except within jurisdiction delegated to the agency, and as authorized by law" 5 U. S. C. 1008(a). Notice of the proposed rule making must be published in the Federal Register; and all interested persons must be afforded an opportunity to submit their views, 5 U. S. C. 1003(a); and "Every agency shall separately state and currently publish in the Federal Register * * * (3) substantive rules adopted as authorized by law * * *". 5 U. S. C. 1002(a); then with pointed emphasis on *substantive rules,* their publication "shall be made not less than thirty days prior to the effective date thereof" unless there be good cause found, and published with the rule, for making it immediately effective. 5 U. S. C. 1003(c).

Exhibit 7 was a "substantive rule" within the meaning of the Act. It purported to bind all planes, public and private, landing and taking off at the airport. It was of *"general applicability and legal effect". "Sanctions"* were attached to it. It was *penal* in character. Sec. 570.131 of the Washington National Airport Regulation, 14 Federal Register 6247-6252, October 14, 1949; 14 CFR 570.131, makes violation "of any rule or regulation prescribed in this part" a misdemeanor, punishable by six months' imprisonment, or a fine of $500, or both. Thus if the courts below are right, an unauthorized departure from the flight paths drawn on Exhibit 7 became a misdemeanor—notwithstanding that the pattern was not published with the notice of intention to adopt it; nor with the definitive regulation, in the Federal Register. We say that these defects were fatal, and the rule never came into being as a federal regulation.

The Administrator of Civil Aeronautics was well aware that traffic patterns had to be published in the Federal Register in order to be binding. He had already published the traffic patterns for LaGuardia Field and Idlewild (International) Airports in New York, and for Newark Airport in New Jersey on February 4, 1949 (14 FR 479), and he has continued to publish revisions of those patterns from time to time since then. His action in this regard is a contemporary administrative construction of the Act. *White* v. *Westchester Club,* 315 U. S. 32, 41 (1942); *Commissioner* v. *South Texas Lumber Co.,* 333 U. S. 496, 501 (1948). His failure to do the same with Exhibit 7 is a fatal defect. He recognized that defect after the disaster by publishing the traffic pattern for the Washington National Airport in full as part of the Air Traffic Rules, 17 FR 7178-7181; August 7, 1952, 14 CFR 60.18-7; and by amending section 570.55 of the Washington National Airport Regulation to read as follows:

> "§ 570.55 *Landing and take-off rules*
>
> • • •
>
> (c) Unless otherwise authorized or directed by air traffic control, landings and take-offs shall be made in conformity with the air traffic patterns prescribed by the Administrator in § 60.18-7 of this title. (The patterns are also published jointly in the Airman's Guide by Anacostia Naval Air Station, Bolling Field, and Washington National Airport.)" 17 FR 7181

and he has continued to publish revisions of Exhibit 7 from time to time since.

Notwithstanding the clear mandate of the Administrative Procedure Act and the Administrator's own administrative construction of the Act with respect to the publication of traffic patterns, the District Judge and the Court of Appeals held that Exhibit 7 was a binding fed-

eral regulation. The Court of Appeals said that although not published in the Federal Register, Exhibit 7 "had been officially prescribed * * * and Eastern had knowledge of it" 221 F. 2d 62, 69. Therefore the Court concluded that Exhibit 7 was a binding federal regulation, breach of which would constitute negligence *per se*. The Court did not explain what "officially prescribed" means, nor did it enter upon any discussion of the Administrative Procedure Act, nor the elaborate structure erected by that Act, to safeguard the rights of the public from arbitrary administrative fiat.

In so deciding the court below adopted a view exactly contrary to that which the Court of Appeals for the Ninth Circuit, had arrived at in the earlier case of *Hotch* v. *U. S.*, 208 F. 2d 244, 250, 212 F. 2d 280.[7] There Hotch was convicted of violating a Department of the Interior regulation closing the water of Taku Inlet to commercial fishing. His conviction was affirmed by the Court of Appeals for the Ninth Circuit, 208 F. 2d 244, but on rehearing Hotch, for the first time, attacked the existence and validity of the regulation on the grounds that it had not been published in the Federal Register. The Court of Appeals reversed the conviction on the ground that the purported regulation never came into legal existence. The Government then petitioned for rehearing of the Court's decision on rehearing, upon the ground that Hotch admitted he had *actual* notice of the purported regulation, and that such actual knowledge made publication in the Federal Register unnecessary as to him. The Court affirmed and rejected that view and adhered to its previous (rehearing) decision 212 F. 2nd 280.

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[7] Although the opinion of the Ninth Circuit on the second rehearing in the *Hotch* case, 212 F. 2d 280, was called to the attention of the Court of Appeals, it is not cited in the original opinion 221 F. 2d 62, nor in the opinion handed down after remand 239 F. 2d 25.

Circuit Judge Stephens, writing for a unanimous bench, carefully analysed the Federal Register Act and the Administrative Procedure Act. He rejected the contention that these Acts were merely in the nature of recording statutes designed to give *constructive* notice to those who are without actual notice. He recognized the Administrative Procedure Act as inaugurating a new departure in the field of administrative law, and he ruled that the objects, purposes and intent of the Act were such as to "require publication, irrespective of actual notice, as a prerequisite to the *issuance* of a regulation * * *", 212 F. 2d 280, 283-4.

The view of the Ninth Circuit is manifestly the correct view. It effectuates the objects, purposes and intent of the Administrative Procedure Act[8], in addition to comply-

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[8] See Administrative Procedure Act—Legislative History 79th Congress, 1944-46, Senate Document 248, Foreword by Senator McCarran; and see House Committee Report No. 1980 79th Congress printed at pp. 235-282 of that Document. See also Attorney General's Manual on the Administrative Procedure Act, 1948, I. C. C., Practitioners Journal, Vol. XV No. 5; also Final Report, Attorney General's Committee Jan. 24, 1941, Senate Document 8, 77th Congress, First Session.

District Court decisions dealing with the effect of non publication are found in *Woods* v. *Benson Hotel Corp.*, D. C. Minn. 75 F. Supp. 743, 748 affirmed 168 F. 2d 694 where the court declined to enforce an interpretive bulletin of the Housing Administration because of the failure to publish in the Federal Register. *U. S.* v. *Morelock*, D. C. Md., 124 F. Supp. 932, 945, where the court held that the failure of the Secretary of Agriculture to publish in the Federal Register his instructions to wheat growers that they should aid Government representatives in the measurement of wheat acreage, deprived such instructions of any binding validity. *Brownell* v. *Schering Corp.*, D. C. N. J. 129 F. Supp. 879, 904 affirmed 228 F. 2d 624, cert. denied 351 U. S. 954 held that the directive of an alien property custodian addressed to a particular corporation was not of such "general applicability and legal effect" as to require publication in the Federal Register. *U. S.* v. *Reed*, D. C. Md. 110 F. Supp. 253, 256 held the publication of a form of truck driver's log required by the Interstate Commerce Commission was not necessary where the order direct-

ing with its plain words. The structure of the Act is such that it sets up some ten areas in which the acts of administrative agencies are made subject to detailed control (Senate Document No. 248, 79th Congress pp. 193-195) including for example "Public Information", "Rule Making", "Adjudication", "Powers and Sanctions", "Review" etc. Of all these we dare say that public information and rule making are the most basic. The *Hot Oil* situation dramatized the deplorable lack of public information, but its immediate result was the Federal Register Act, not the regulation of the rule making activities of "agencies".

The Administrative Procedure Act went far beyond the Federal Register Act, and among other things, set up the procedure which must be followed in order to give an agency regulation the force and effect of law, binding upon the public. Probably the most fundamental requirements of the rule making process set up by the Act was that the public be informed; that notice of the rule making and opportunity to be heard thereon be duly given by publication in the Federal Register, 5 U. S. C. 1002 (a)(b), 1003(a)(b); that after adoption all *substantive rules* be "separately stated" and currently *published* in the Federal Register; and that such publication must be 30 days *prior* to their effective date of the rule, 5 U. S. C. 1003(c), Senate Document 248, 79th Congress, pp. 16, 20, 193-194, 255-256, 257-259; Attorney General's Manual, 1948, pp. 17, 19, 22, 26. At page 36 of the Manual the Attorney General

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ing the use of such log was published with a statement that the form, as filed with it, was made a part thereof, and a copy of the form was delivered to the defendant. See also *Durkin* v. *Edw. S. Wagner Co.*, E. D. N. Y. 115 F. Supp. 118, affirmed *sub nom. Mitchell* v. *Edw. S. Wagner Co.*, 217 F. 2d 303, 304 cert. den. 348 U. S. 964; also Judge Parker's decision, writing for a statutory court in *Rheman Co.* v. *U. S.*, 133 F. Supp. 668, applying the yardstick of the Administrature Procedure Act to the rule making powers of the Interstate Commerce Commission in enlarging the commerical zone of Charleston, S. C.; also *Allegheny Air Lines* v. *Village of Cedarhurst*, E. D. N. Y. 132 F. Supp. 871, affirmed — F. 2d —, 5 Avi. 17,166.

makes it clear that the so called "deferred effectiveness" provisions of Section 4(c) of the Act, 5 U. S. C. 1003(c), the 30 day lag between publication and effective date, is a most substantial element in the rule making process; that it is in addition to, and not to be confused with, the "general notice of proposed rule making" of Section 4(a), 5 U. S. C. 1003(a). The Final Report, Attorney General's Committee, January 24, 1941, Senate Document 8, 77th Congress, pp. 114-115 makes this even clearer. Publication of the substantive rule in definitive form is an essential and indispensable ingredient of the rule making process. If it is absent, there is no substantive rule binding on anyone.

To say that actual knowledge of a *purported* rule is an adequate substitute for publication in the Federal Register is to reduce the elaborate rule making structure of the Administrative Procedure Act to an absurdity. Actual knowledge may, or may not, have been sufficient under the Federal Register Act prior to the Act, but under the Administrative Procedure Act there can be no question. *Certainty* and *uniformity* in the application and effect of substantive rules was one of the prime objectives of the Act. To give the Act the sterile character of a recording statute aborts those objectives, and utterly destroys the "notice and opportunity to be heard" structure so carefully framed in Sections 4 and 7 of the Act, 5 U. S. C. 1003, 1006.

If the test of validity is actual knowledge of the purported regulation, then a "regulation" adopted in complete disregard of the rule making requirements, and "filed" in the *desk drawer* of an agency official, is valid as to one who had actual notice of the agency's intent—and the *Hot Oil* situation is back with us again. The absurdity of such a proposition need not be elaborated to this Court.

But consider in practical effect the rule laid down by

the *Hotch* case, and contrast it with the rule laid down by the court below. Under the *Hotch* case a substantive rule is either valid or invalid, depending upon the agency's compliance with the Administrative Procedure Act. That makes for certainty, uniformity, simplicity, and order. A given regulation is either valid as to all people, or is invalid as to all. The rule of the court below is the exact antithesis. A regulation may be *valid* and *invalid at the same time*. It is valid as to one with actual knowledge, and invalid as to one without such knowledge. One man may commit a crime and incur sanctions and penalties for an act or omission, while his next door neighbor, for the same act or omission, is held innocent. One pilot may fly his plane into the Washington National Airport and incur a $500 fine because he does not follow a flight path south of Alexandria before landing on Runway 3. Another pilot landing ten minutes later does the same thing and incurs no sanctions. One pilot admits he knew of the regulation and is convicted of a crime; another denies he knew of the regulation, so no law exists upon which to convict him. But who is to say whether an accused *knew* or *did not know* of the regulation? Who is to decide this question of fact as to the existence or non-existence of a law? Not the jury, because under our carefully guarded separation of functions the jury's sole province is to take the law as instructed by the court, and apply it to the facts as they find them. The jury finds "facts". It does not find "law".

It was contended below that since the Washington National Airport regulation, 14 CFR 570, as published in the Federal Register of October 14, 1949, 14 FR 6247, provided that the landings and take-offs should conform to a traffic pattern "published jointly in the Airman's Guide by the Anacostia Naval Air Station, Bolling Field and the Washington National Airport" 14 CFR 570.55(c) such a provision (although not publishing the traffic pattern in form or substance) was sufficient compli-

ance with the Administrative Procedure Act, both as to Notice of Proposed Rule Making, and as to final publication. The Airman's Guide, issue of March 1, 1949 contained a facsimile of Plaintiffs' Exhibit 7, without any statement or explanation connecting it to 14 CFR 570.55. Considered against the background of the Act, its objectives, purposes and long legislative history, this argument is little short of being fanciful. Under it each successive issue of Airman's Guide could contain a different traffic pattern for the Washington National Airport, and the Administrator, or his delegate, could legislate, willy nilly, simply by publishing therein. Airman's Guide is not a statutory publication. No doubt it is good and useful, but it is not the Federal Register. The Administrator might with the same effect, have published the pattern in the Saturday Evening Post.[9]

The District Judge was of the view that Exhibit 7 need not be published "in haec verba" in the Federal Register as long as the Administrator had "adopted" it (IV JA 860-861). Apparently he felt the Federal Register could incorporate the Airman's Guide by reference, but which of the 26 issues per year of the Airman's Guide were to be incorporated by reference, he did not say, and neither does 14 CFR 570.55(c). But quite apart from this, the Administrative Procedure Act of course does not

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[9] The pattern as published in Airman's Guide, issue of March 1, 1949, was completely without explanation. No reference was made to 14 CFR 570, nor to the authority under which it purports to be issued. There was no indication that it was "published jointly" with Anacostia Naval Air Station and Bolling Field, or otherwise to identify it as the traffic pattern referred to in 14 CFR 570.55(c). Indeed it would have been impossible for the Airman's Guide so to have identified the pattern because it published the pattern on March 1, 1949, and 14 CFR 570.55(c) did not purport to become effective until its publication in the Federal Register on October 14, 1949. From March 1, 1949 to the date of this accident there were some seventeen issues of the Airman's Guide successively published every two weeks by the Government Printing Office.

authorize incorporation by reference. That is contrary to its plain purpose and intent. Incorporation by reference was one of the very evils which the Federal Register Act and the Administrative Procedure Act were designed to eradicate. Neither of the Courts below dealt with the problem from a "rule making" standpoint 5 U. S. C. 1003. The distinction between public information as to a definitive rule 5 U. S. C. 1002(a), 1003(c) and the requirements of rule making 5 U. S. C. 1003(a)(b), seems to have been ignored by the Courts below, though fully urged. In this regard see Mr. Justice Harlan's decision in the Second Circuit in *Air Line Pilots Assn.* v. *C. A. B.*, 215 F. 2nd 122.

It was argued below that the Federal Register need not physically contain all the minutiae of forms, drawings, etc. but that argument is patently fallacious, for *prior* to the publication of the Washington National Airport regulation (minus the pattern) in the Federal Register of October 14, 1949, the Administrator had on February 4, 1949 already published *maps, diagrams, flight patterns* and instructions, all constituting the landing patterns for the LaGuardia Airport in New York, the New York International Airport, and the Newark Airport. In publishing those maps, diagrams and flight paths the Administrator stated he was acting under the Administrative Procedure Act in prescribing the traffic pattern. 14 FR 479-481, Feb. 4, 1949.

Thus whatever Exhibit 7 was; whatever may have been its legal effect, it was not a binding and valid federal regulation. At the most it was an expression of the will or desire of the Administrator, but it was not "the law". Consequently a departure from it was *not* "negligence *per se*", and the District Court was wrong when it instructed the jury that it was (X JA 2109).

This error was a grievous one and cast great prejudice upon the petitioner airline. For, once the jury found that Eastern was not cleared to land (as they did) then they were foreclosed from considering, as a *matter of fact*, whether the operation of the DC-4 was negligent or not negligent, and *forced* to find Eastern liable as a *matter of law*. They were also foreclosed from considering whether non-conformity with Plaintiffs' Exhibit 7 had any causal relation to the accident. They were likewise foreclosed from considering whether Eastern's failure to go south of Alexandria was *evidence of any negligence*. They were charged as a matter of law (over appropriate exception) that once they found that the DC-4 was not cleared to land, then Eastern was negligent *per se*. That was the most vital issue in the whole case. It was the only basis upon which the jury could have found a verdict against Eastern. The error went to the very root of the case.

We respectfully submit therefore that the decision of the Court of Appeals for the Ninth Circuit in the *Hotch* case correctly states the law applicable to the publication requirements of the Federal Administrative Procedure Act; that the Court of Appeals in its decision below has rendered a decision in conflict with that of the Court of Appeals for the Ninth Circuit on the same matter and has decided an important question of Federal law which has not been but should be settled by this Court.

II

The Writ should be granted for the further reason that the verdict was so plainly contrary to the evidence that it cannot be sustained on any rational grounds. It was a flagrant miscarriage of justice, and the refusal to set it aside was a clear abuse of judicial discretion which should be corrected by this Court.

The basic outline of petitioner's new trial motions appears in the Statement of the Case, pp. 11-13 supra, and petitioner's case for a new trial is probably best set forth in Circuit Judge Miller's opinion on remand, 239 F. 2d 25, 28. In that opinion the Court of Appeals carefully examined its power to review the District Court's refusal to set aside the verdict and concluded that it had the *power* and *duty* to reverse and order a new trial if the trial judge's refusal to set aside the verdict constituted an abuse of judicial discretion. After a most careful review of the record the Court of Appeals, as we read their decision, concluded unanimously that the jury verdict against Eastern Air Lines in this case *was* contrary to the evidence, *was* the result of passion, prejudice and sympathy and *was* productive of injustice (239 F. 2d 25; App. p. 40a). But the majority of the Court of Appeals (Edgerton and Fahy, Circuit Judges) concluded that the verdict was "not *so clearly* against the weight of the evidence or *so plainly* the result of passion, prejudice and sympathy, or otherwise *so unjust* that the trial judge can be said to have abused his discretion in refusing to grant a new trial." (239 F. 2d 25, 30; App. p. 48a). Judge Miller writing with deep conviction earnestly dissented from the conclusion of his brothers on that point. He wrote the entire opinion for the Court of Appeals on remand and his dissenting views are set forth at 239 F. 2d 25 et seq. as well as at pp. 40a to 54a of the sepa-

rate Appendix. It is difficult to add to what Judge Miller has said; but in a case of this magnitude, importance, and complexity, petitioner believes that clarity and completeness require brief allusion to those parts of an undisputed record which demonstrate that the trial judge abused his discretion in refusing to set aside this verdict.

This case went to the jury on the theory that if the Eastern plane had received landing clearance from the control tower it was authorized to be where it was at the time of the collision, and was not in violation of the landing pattern, Ex. 7, also on the theory that a clearance to land transmitted to Eastern gave the full assurance of safety from that point on and entitled the Eastern plane "to assume that no other plane has been cleared to land on the same runway at the same time, and that all other craft in the control zone have been properly separated by the tower (from the Eastern DC-4) and do not constitute a hazard to it" (X JA 2111).

Thus on an affirmative finding that the DC-4 was cleared to land, under the Court's instruction to the jury, Eastern was entirely free of fault. Other minor and trifling, and unproved, allegations of fault on the part of the Eastern plane, viz, lookout, right of way, etc. were entirely removed from jury consideration by the instruction that if Eastern was cleared to land it was entitled to assume that all other planes had been effectively separated, and did not constitute a collision hazard.

The District Court in the Tort Claims Act cases found that the DC-4 *had* been cleared to land (113 Fed. Supp. 80; I JA 51; App. p. 55a). The Court of Appeals reviewed that finding and found it "amply justified" (221 F. 2d 62, 79; App. p. 35a). This Court affirmed (350 U. S. 907).

Under the trial court's charge to the jury Eastern could have been found liable only if it had *not* been cleared to land. Having found against Eastern the jury necessarily found that the DC-4 was not cleared to land, thus placing it in direct conflict with the fact finding of the trial judge. The result is an extraordinary and unusual situation in which, having heard the *same* evidence, from the *same* witnesses, at the *same* time, and on the *same* record the Court (as a trier of the facts) and the jury reached precisely contradictory conclusions. Such inconsistent and conflicting decisions on an identical fact issue simultaneously arrived at by two different triers of the facts on the *same* evidence from the *same* witnesses on the *same* record is a rude shock to the ordinary concepts of order and reason in the judicial process. The dissenting judge felt that this conflict of findings, when considered in the light of the other features of this record (hereinafter referred to), demonstrated beyond peradventure that the verdict was clearly contrary to the evidence, induced by passion, prejudice and sympathy, and productive of a miscarriage of justice (239 F. 2d 25, 33; App. p. 54a); but the majority of the Court felt it was not *so much* against the weight of the evidence as to constitute an abuse of the trial court's discretion in refusing to set it aside.

It is axiomatic that the proposition (whether the Eastern plane had been cleared to land) cannot be *true* and *false* on the same record, at the *same* time and under the *same* aspect. Therefore and by simple definition, either the jury was wrong in finding that the Eastern plane *was not* cleared to land, or the trial judge (as affirmed by the Court of Appeals and by this Court) was wrong in finding that Eastern *was* cleared to land.

These respondents are the beneficiaries of the strange oddity presented by this record. They have *recovered* a final judgment from the United States on a finding (af-

firmed by this Court) that the DC-4 *was* cleared to land; and they have a verdict against Eastern on a finding that it was *not*—both on the same record, and respondents parties to that record. Can they take the benefit of the finding in one case and reject it in the other? In their claim against Eastern are they not foreclosed by the findings in the final judgment which they have against United States?

This is not the ordinary situation in which two *different* juries have made conflicting findings of liability on the same accident, having heard the same or different witnesses on different records. Here the contradictory findings were made on the same evidence heard at the same time, in the same record, from the same witnesses. It violates the orderly fabric of the judicial process to accept such an alien result, and say the Court is powerless to rectify it. It is understandable that the layman is puzzled[10] and indeed the courts as well. "Certain it is, the result of conflicting answers to the same questions on the same evidence is not in the public interest and tends to bring the judicial process in disrepute" *Benbow* v. *Wolf* (1954), 9 Cir., 217 F. 2d 203, 204. We say it can, and should be, corrected by granting a new trial, and that the Courts below (as the dissenting judge said) abused their discretion in declining to order one.

The unseemly conflict presented by this record was made possible by the joinder of the jury and non-jury cases.[11]

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[10] See the editorial entitled "Legal Paradox", Washington Evening Star Oct. 4, 1956.

[11] In the interests of economizing the Court's time and public expense petitioner, respondents, and the government stipulated to try the jury and non-jury cases together; but no one did or could foresee the extraordinary course which the litigation took; nor the incredible conflict of findings on the single issue upon which defendants in both cases were held liable. Petitioner's consent was to a "fair trial", not to what took place in this courtroom.

In authorizing such a joinder *U. S.* v. *Yellow Cab*, 340 U. S. 543, 555 this Court did not overlook the difficulties inherent therein, but at the same time pointed out that "such difficulties are not insurmountable" (p. 555), citing *Engelhardt* v. *U. S.*, 69 F. Supp. 451 and similar cases in the footnote on that page.

Apparently the difficulties envisioned in the *Yellow Cab* case included the recognized possibility that as a result of the authorized joinder the District Judge and the jury might arrive at precisely contrary results on the same evidence from the same witnesses on the same record.[12] The evident solution to that "difficulty" is the corrective power which lies in the grant of a new trial. That power became a "duty" on the record presented by the case at bar. We submit that the District Judge abused his discretion; that the dissenting Judge in the Court of Appeals was right; and that the judgment below is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

But petitioner's new trial claim rests on broader grounds than the irreconcilable conflict of findings. The *identical verdict* which held Eastern simultaneously exonerated Bridoux. The exoneration of the P-38 pilot was grotesque and unnatural on its face. As the Court of Appeals said "Bridoux himself practically conceded his own negligence (of which the jury rather unaccountably

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[12] In *Capital Transit* v. *U. S.* 183 F. 2d 825, reversed and remanded *sub nom. U. S.* v. *Yellow Cab Co.*, 340 U. S. 543, the Court of Appeals of the District of Columbia opined "This [joinder] opens up the possibility of the Court and jury reaching opposite conclusions on the same questions. • • •", and felt that "paradoxical possibilities" of this sort were suggestive of a congressional contra indication to joinder. (p. 829). The same difficulty was feared by the Ninth Circuit to present an "unsolvable dilemma" to the trial judge (*Benbow* v. *Wolf*, 217 F. 2d 203). Undoubtedly it was one of the "other situations, equally insurmountable," foreseen by Judge Bryan in *Drummond* v. *U. S.*, E. D. Va. 78 F. Supp. 730, 732.

exonerated him)" 221 F. 2d 62, 79, App. p. 35a. He was having engine trouble and was in a hurry to land. He came in on a long high final descent to land on Runway 3 without dipping his nose or tipping his wings to obtain visibility (III JA 557). He admitted that the structure of his plane was such that at an altitude of 1100 to 1200 feet (II JA 433) he could *not* see anything on the ground nearer to him than two miles (II JA 444; III 55[2]). The collision was at the stipulated altitude of 300 feet and a simple mathematical computation demonstrates that at that altitude his area of obscured visibility was about 3500 feet. He could have compensated for his plane's visual limitations, but he did not do so (III JA 556; X JA 2003-2004). Under the Air Traffic Rules he was "careless and reckless" 14 CFR 60.12(c). Elementary care required him to maneuver his plane so as to compensate for its visual deficiencies *Kuhn* v. *C.A.B.* 87 App. D. C. 130, 134, 183 F. 2d 839, 843.

Accepting Bridoux' testimony on its face, the P-38 was a rude and wanton aggressor in the traffic pattern of a busy metropolitan airport. When the tower told him he was No. 2 to land he *assumed* that this was an absolute clearance; for he elected to decide for himself which plane was the No. 1 to land ahead of him. From a distance of 5 or 6 miles away he noticed a plane landing, and saw it was "more or less the same airplane" which he thought was No. 1 in the pattern (III JA 549; III JA 546-550). As a result he flew his plane, head on, into the DC-4 striking it from above and behind and killing 55 people. At this point the Court is respectfully referred to Circuit Judge Miller's analysis of the Bolivian pilot's testimony in 239 F. 2d 25, 32, as well as in the original opinion of the Court of Appeals in 221 F. 2d 62, 79.

The exoneration of this confessed aggressor whose ignorance and wanton carelessness brought death to 55 people stamps this verdict as unmistakably grotesque. We submit, the view of Judge Miller is the correct one on

the undisputed facts of this record. The only rational explanation for the exoneration of Bridoux and the finding against Eastern is that the jury was moved by sympathy for Bridoux, and by prejudice against Eastern. "The source of the jury's sympathy for Bridoux is easily seen in his testimony. His story was a moving one, even in cold print. It must have been even more dramatic and appealing when he told from the witness stand in faulty English how he had never seen the Eastern craft, how he plunged into the Potomac and how he escaped from his" doomed plane "as it lay on the bottom of the river, although he was grievously injured." 239 F. 2d 25, 32; App. p. 51a.

Judge Miller also felt the verdict was a self-evident *miscarriage of justice*. But it is another strange anomaly in this record that the two other members of the Court felt that the *degree of such injustice* was not sufficient to move a reviewing court to corrective action. That, indeed, is a sorry commentary on the power of our courts to achieve justice. Judge Miller said he was "unwilling to believe the court is powerless to right the wrong which has been done in these cases" 239 F. 2d 25, 33; App. p. 54a.

We submit that the courts are not without the power to right such a wrong; and that this Court should exercise its supervisory power and correct the gross departure by the courts below from the accepted usual course of judicial proceedings, grant certiorari and reverse the judgments below.

A concluding reference should be made to the jury finding that the collision occurred in the District of Columbia. That finding was contrary to the stipulated physical facts, and to respondent's own expert testimony. On the trial the parties stipulated (IX JA 1923-1928) that immediately following the collision the DC-4 spilled parts, wreckage and heavy objects which fell in the State of

Virginia at the points shown on Exhibits 10 and 10A (XI JA 2162, 2163). Since when she was struck the DC-4 was traveling at the agreed speed of 130 miles per hour on final approach to runway 3 (heading 30°), under the testimony of respondent's expert those heavy objects would move forward in the same direction as the plane was headed for a distance of 840 feet before striking the ground. The forward section of the plane with four engines operating moved forward and came to rest in the water some 815 feet northeast of the Virginia shore on a line parallel to runway 3 (IX JA 1923). The separated tail section of the DC-4 fell and came to rest on the Virginia shore. Manifestly the heavy objects found on both sides of Memorial Highway in the State of Virginia could not have gotten there unless the collision occurred over land—otherwise those heavy objects would have to have *flown backwards* hundreds of feet, an impossible hypothesis. For this further reason it is submitted this verdict cannot be supported on any rational ground. It contradicts the physical facts and conceded scientific laws on the basis of which the case was tried. Thus the anomalies presented by this record are further multiplied. The United States has been held liable under the Virginia death statute because it cleared the DC-4 to land, while Eastern has been held liable under the District of Columbia death statute because the DC-4 was not cleared to land. Apart from all else this speaks most eloquently to the necessity for a new trial.

Conclusion

In the judgments below the Court of Appeals erroneously decided a federal question of major importance under the Administrative Procedure Act; decided it in a manner contrary to the Court of Appeals for the Ninth Circuit; and in a manner which frustrates the objectives and intents of the Federal Administrative Procedure Act. Furthermore the verdict below was so plainly contrary to

the evidence, and the physical facts, that it cannot be sustained on any rational grounds. The conflict of findings by the District Court in the non-jury case, and the jury finding, offended the most elementary notions of order and reason in the judicial process. The exoneration of the Bolivian pilot in the face of his virtual concession of negligence makes the irrational character of the verdict self proving. It is submitted accordingly that this Court should grant this petition for a writ of certiorari, and should reverse the judgments below.

Respectfully submitted,

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FILED
MAR 15 1957
JOHN T. FEY, Clerk

No. 841

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

Nos. and

EASTERN AIR LINES, INC.,

Petitioner,

v.

UNION TRUST COMPANY, *et al.*,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Original Opinion of Court of Appeals for the District of Columbia, Dated February 8, 1955

United States Court of Appeals,
District of Columbia Circuit.

EASTERN AIR LINES, Inc.,
Appellant,

v.

UNION TRUST COMPANY et al.,
Appellees.

UNITED STATES OF AMERICA,
Appellant,

v.

UNION TRUST COMPANY et al.,
Appellees.

Nos. 11991, 11992, 12017, 12018.

Argued June 22, 1954.

Decided Feb. 8, 1955.

Petition for Rehearing In Banc Denied in all Cases on April 15, 1955.

Petition for Rehearing Denied by the Division which Heard the Case in Nos. 11991-2 on May 4, 1955.

Petition for Rehearing Denied by the Division which Heard the Cases in Nos. 12017-8 on May 11, 1955.

As Amended June 24, 1955.

Mr. Joseph W. Henderson, Philadelphia, Pa., with whom Mr. Richard W. Galiher, Washington, D. C., and Mr. John

M. Aherne, of the bar of the Supreme Court of New York, were on the brief, for appellant in Nos. 11,991 and 11,992.

Mr. Lester S. Jayson, Atty., Dept. of Justice, of the bar of the Court of Appeals of New York, pro hac vice, by special leave of Court, with whom Messrs. Leo A. Rover, U. S. Atty., Paul A. Sweeney, Atty., Dept. of Justice and D. G. Galotta, Atty., Civil Aeronautics Administration, were on the brief, for appellants in Nos. 12,017 and 12,018. Mr. Lewis A. Carroll, Asst. U. S. Atty., entered an appearance for appellants in Nos. 12,017 and 12,018.

Mr. David G. Bress, with whom Messrs. Sheldon E. Bernstein, Alvin L. Newmyer and Jo V. Morgan, Jr., Washington, D. C., were on the brief, for appellees in all cases.

Before Edgerton, Wilbur K. Miller and Fahy, Circuit Judges.

Wilbur K. Miller, Circuit Judge.

On the morning of November 1, 1949, an Eastern Air Lines DC–4 plane was flying from New York to Washington, carrying fifty-one passengers and a crew of four. When it was on final approach for landing on runway 3 at the Washington National Airport and at an altitude of about 300 feet, the airliner was struck from above and behind by a P–38 military-type aircraft just purchased by the Bolivian Government, which was being tested by a Bolivian military pilot, Eric Bridoux, who was its only occupant. The DC–4 was cut in two. The forward part fell in the Potomac River, the after portion on the Virginia shore. All fifty-five persons aboard were killed. The P–38, badly damaged, of course, plunged into the

river but somehow Bridoux escaped from the cockpit. He was rescued and, despite serious injuries, survived.

These suits were brought in the United States District Court for the District of Columbia by the Union Trust Company and Melville W. Stuart as the executors of Ralph F. Miller and Mildred E. Miller, his wife, who were passengers on the DC–4. Eastern Air Lines, Inc., and Eric Bridoux were named as defendants in two of the actions and the United States was the defendant in the other two.[1] Many similar suits filed on behalf of the estates of others who died in the fatal crash are pending under an agreement that the determination of liability in these cases shall govern their disposition.[2]

Although the two captioned cases against Bridoux and Eastern were tried to a jury, and the two against the Government to the Court, by agreement of the parties all four actions were tried simultaneously. The jury found Bridoux not "liable," but found against Eastern Air Lines in the sum of $50,000 for the estate of Ralph F. Miller and in the sum of $15,000 for the estate of his wife. In the Federal Tort Claims actions against the United States, the trial judge held the Government liable to the estates and fixed the damages at $50,000 and $15,000 respectively. D. C. 113 F. Supp. 80. Eastern Air Lines and the United States appeal.

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[1] Aubin & Lyons, t/a Universal Marine and Supply Company, were also named as defendants on the theory they owned or had some interest in the P–38. They were dismissed when it appeared that title to the plane had passed to the Bolivian Government.

[2] It was also agreed that the determination of the situs of the accident (whether it occurred over the Potomac River, which is in the District of Columbia, or over land in Virginia), made in these cases, shall be binding in all the others. The situs is important because a Virginia statute limits recovery for wrongful death to $15,000. In the District of Columbia there is no statutory limit.

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I

We first summarize the factual background which is essential to an understanding of the reasons for reversal advanced by the appellants. The Washington National is a controlled airport; that is to say, from a glass-enclosed observation platform in a control tower standing above and west of runway 3, employees of the Civil Aeronautics Administration observe arriving and departing planes and direct their movements by radio. An incoming plane may not land and a departing plane may not take off until it receives tower permission to do so.

The Administrator of Civil Aeronautics adopted, and published in the Federal Register October 14, 1949 [14 Fed. Reg. 6247–6250], a regulation for the administration of the Washington National, which is a civilian airport owned by the United States. Section 570.55(c) of the regulation is as follows:

> "(c) Aircraft landing or taking off shall conform to the air traffic pattern as published jointly in the Airman's Guide by the Anacostia Naval Air Station, Bolling Field and the Washington National Airport."

The air traffic pattern referred to is a map of the airport and vicinity, with lines drawn over it intended to show the general flight patterns for taking off from and landing on the various runways. For landing on runway 3, it shows a southward pattern to a point south of Alexandria (the downwind leg), then an east turn until over the Potomac River (the base leg), then northwardly over the river to a point a short distance northeast of Alexandria, where it curves to the left over the Potomac Yards, and then a curve to the right in a line for a straight approach to runway 3. The drawing itself was

published in the Airman's Guide March 1, 1949, but was not published in the Federal Register until August 7, 1952, long after the accident here involved. The regulation published October 14, 1949, referred to but did not include the traffic pattern.

Over Eastern Air Lines' vehement objection, the trial court admitted the traffic pattern when it was offered in evidence by the appellees, and charged the jury that it was a binding Federal regulation, and that an unauthorized deviation therefrom would be negligence *per se*. Eastern admittedly had knowledge of the pattern.

On the morning of the accident Glenn D. Tigner, one of the seven traffic control operators who were working in the tower, was advised by the Eastern DC–4 at about 11:38 a. m. that it was over Beltsville, Maryland, 15 miles northeast of the airport, and was asked for landing instructions. Tigner authorized it to enter a left traffic pattern for landing on runway 3 and advised the pilot to contact the tower again from a point closer to the airport. Tigner testified that in a second communication, when the Eastern plane was still north of the airport, he cleared it to land on runway 3.[3] He fixed the time of the

[3] The Administrator of Civil Aeronautics was called by the court as a witness on the meaning of the phrase "cleared to land." He testified that when a plane in the traffic pattern of an airport is "cleared to land," the pilot of the plane is thereby authorized to commence his landing approach operation immediately; in other words, when a pilot receives that clearance, wherever he may be in the traffic pattern, there is no plane ahead of him and he may make his turn at his discretion and consistently with the safe management of his plane, and may come in and land at once on the runway which has been designated by the tower. That this is the only meaning of the phrase "cleared to land" was the unanimous testimony of all the certified air traffic controllers who testified on the subject. The trial judge instructed the jury as a matter of law that such was the meaning of the phrase "cleared to land."

clearance as approximately 11:44 a. m. The DC–4 con tinued its flight and entered the traffic pattern as it had been directed to do. It had circled from the pattern and was on final approach for runway 3 when it was struck by the Bolivian plane.

The Bolivian P–38 had taken off from runway 3 at 11:3 a. m. and therefore had been in the air only between nine and ten minutes when the collision occurred. Shortly after he had cleared the DC–4 to land, Tigner observed the P–3 at a high altitude, circling Alexandria about seven miles south of the airport, heading toward the east and starting a turn to its left. Tigner was then talking to another plane. He was informed by a tower colleague the P–38 was requesting landing instructions. He saw it continuing its left turn and said by radio, "Bolivian 927, did you reques landing instructions?" Bridoux replied he had done so whereupon Tigner told him he was cleared to enter the left traffic pattern for runway 3 and asked him to repor on his downwind leg west of the airport.

Tigner said when he next saw the P–38 it was abou five miles southwest of the airport at about 4,000 fee heading northeastwardly with its gear down and in steep and rapid descent. At 11:45 a. m. he warned th DC–4 that the P–38 was in traffic. He said to the P–3 "Bolivian 927, make a 360 to your left. You are No. to land. Traffic is an Eastern DC–4, turning final ahea and below you." Bridoux did not acknowledge the messag and did not turn as directed. Tigner then called, "Bolivia 927, turn left, turn left. You are No. 2 to land, followin an Eastern DC–4 turning final ahead and below you Bridoux did not acknowledge or comply.

During these transmissions the DC–4 was on its ba leg turning into final approach. When Tigner saw th

P–38 was not complying with his instructions, he called the DC–4 and said, "Eastern 537, make an immediate left turn. Traffic is P–38 above and behind you." The DC–4, which had gone only about a quarter of a mile on final approach, responded with a surge of power into a left turn. As it did so, the Bolivian plane struck it.

Bridoux testified that a minute after his take-off he began to have engine trouble. He reported that fact to the tower and requested landing instructions. Receiving no answer, he repeated his request and the tower said, "Land 2 on Runway 3," which he understood to mean there was another plane ahead of him behind which he was to land. He testified he also understood this message to constitute a clearance to land rather than merely clearance to enter the traffic pattern.

When he was about two miles west of the airport descending at a rate of 500 to 600 feet a minute, Bridoux said he saw a plane making a final approach for a landing either on runway 36 or 3, which was either a Beechcraft C–45 or a Lockheed C–60. He said, "• • • I realized that that was the reason I was No. 2 to land." He continued flying south until he was about five or six miles south of the field and then made a 90-degree left turn. As he did so, he observed the Lockheed or Beechcraft on the ground taxiing toward the buildings. He had not seen it actually land.

Having been told by the tower he was No. 2 to land on runway 3 and having seen, as he thought, that the plane which was No. 1 to land on that runway had already done so and had taxied away, Bridoux concluded it was unnecessary for him to check with the tower to learn whether the plane ahead of him had landed. We reproduce in the

margin[4] his testimony that he regarded the tower's statement, "You are No. 2 to land on runway 3," as absolute clearance to land after he had decided for himself, without further communication with or from the tower, that the No. 1 plane was out of the way.

After seeing the Lockheed or Beechcraft taxiing from runway 3, Bridoux flew on for about one and one-quarter miles and made another 90-degree left turn to proceed on final approach, after which he headed north flying at 150 m. p. h. and at an altitude of about 1,200 feet. He said he then called the tower, advising he was on final approach and that the tower responded, saying, "Bolivian P–38, prepare to land on runway 3," and gave him the wind direction; and that he acknowledged the instruction. He then put his flaps down, reduced his speed to about 130 m. p. h., and began an S turn to line up with runway 3. As he did so he heard over the radio, "Clear to the left, clear to the left," but thought the instruction was for somebody on the ground. He did not turn to the left or

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4 "Q. As a matter of fact, at that point you not only accepted that clearance which you told us was given, but you made another complete 360-degree turn around the airport; and then after you had done that, you started downwind leg five or six miles. A. Because I was No. 2 to land, sir.

"Q. You at no time, Captain, asked the identity of the plane that was ahead of you, did you, Captain? A. No, sir.

"Q. And you had no way of knowing, based upon information from the tower, that that plane was ahead of you, did you, Captain? A. Unless I see.

"Q. And you didn't see it. A. I saw it on final approach, the C–45 or C–60.

"Q. What you are telling us is after getting that clearance, you assumed the plane you saw was the one they meant was ahead of you? A. Yes, sir.

"Q. But you didn't check with the tower to see if that was the plane? A. Why have I got to check, if I am seeing?

"Q. I am not asking you why. I am simply asking you if it isn't a fact that you didn't check back with the tower to see if

take any other action, but continued on his course and the collision occurred two or three seconds later.

The visibility from the P–38 was structurally limited so that Bridoux could not see ahead of him except at a considerable distance. He was flying entirely by time, computing the distance covered by multiplying his speed per minute by the number of minutes traveled. He said that at an altitude of 1,200 feet and four and a half miles from the airport he could see nothing ahead and below for a distance of two and one-half miles. It is also observed that Bridoux said that as he descended the nose of his plane was not more than ten degrees under horizontal, and that he was accomplishing the descent by reducing his speed. Thus there was not enough nose declination to increase appreciably the extent of visibility immediately in front of and below the P–38. Bridoux did not see the Eastern DC–4 at any time.

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that plane you saw was the one ahead of you. A. It isn't necessary, because I was seeing the airplane.

"Q. Would you please answer yes or no to my question? You didn't check back with the tower to see if that plane you told us you noticed on final approach was the one ahead of you, did you? A. When I was on final approach, I called the tower.

"Q. Captain, I am asking you, sir, if after you saw that plane, which you said seemed to be lined up for landing, which seemed to be on approach for landing on runway 3, did you at any time thereafter ask the tower if that was the plane that had been ahead of you? A. No, I didn't ask. It wasn't necessary to.

"Q. You did not ask the tower— A. Because it wasn't necessary. I was seeing the airplane. I was watching it.

"Q. What you mean is you saw a plane. A. Yes, sir.

"Q. You have no way of knowing whether that one was the one the tower was referring to, or some other plane, have you, Captain? A. There was a way, because he was on final approach. If he didn't land yet, I understand he is No. 1.

"Q. Isn't it a fact that from that point on there was a lapse of four or five minutes before you came in, on your own final approach? A. More or less.

"Q. And you never contacted the tower to find out where the

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II

With the foregoing background, we turn to Eastern's contention that the court erred in admitting as evidence the approach and landing pattern offered as an exhibit by the appellees; and in instructing the jury it was a binding Federal regulation, a breach of which would constitute negligence *per se*.

With respect to the traffic pattern, the court charged the jury as follows:

> "• • • [T]his pattern in a general sense provided that an aircraft arriving from the north and desiring to land at the Washington National Airport on Runway 3 would proceed from north to west, in the general vicinity of the Pentagon, and then proceed from that direction south, on • • • its downwind leg, and continue in that southerly direction south in the direction of the George Washington Memorial Temple and south of the city of Alexandria; then turning due

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plane that was No. 1 was, did you? A. I called on final approach, advising them I was on final, and they could tell me anything at that time, in order to realize that.

"Q. That was after you had lined up for runway 3, wasn't it? A. No, sir.

"Q. You said you were on final approach. A. On final; but the final is not just the straight line. The final is after the turn from base leg.

"Q. Did you ask the tower for any permission before you lined up for final approach? A. No.

"Mr. Bress: He hadn't said he lined up for final approach.

"The Witness: I called to the tower, after the turn from base and I began the final approach.

"By Mr. Galiher:

"Q. And you didn't ask the tower for permission before you began the final approach, did you? A. I didn't have to ask the tower for permission, after I had been cleared for landing, sir.

"Q. You hadn't been cleared to land at that point, had you,

east on what is called the base leg, and ultimately what is called the final approach, a north or northeast heading.

"* * * This is the prescribed pattern. But you are instructed as a matter of law that there is nothing rigid about it. It must be conformed to in a general way. In other words, the pattern is not a line drawn over the ground which must be followed by the airplane in question. It is just exactly as the word itself indicates, a pattern which must be followed, but not with the rigidity and the inflexibility of a line from one point to another. Indeed, the very purpose of flight traffic patterns is to control traffic, and at an uncontrolled airport it must be followed; but at a controlled airport, such as Washington, the controller has the final say; and you are so instructed.

"However, the unauthorized stepping out of the

Captain? A. I had been cleared for landing, and the first call from the tower cleared me for landing.

"Q. You mean when you were told you were No. 2 to land on runway 3? A. Yes.

"Q. And that is the only clearance you have had up to this point? A. I know I was the second.

"Q. And that was issued upon the final approach? A. No; it was before the final approach.

"Q. Whether it was after or before you had begun the final approach, you had begun the final approach before you got any landing clearance from the tower. A. No, sir. The first call from the tower was when I was cleared for landing.

"Q. For what? A. They cleared me for landing.

"Q. For landing No. 2? A. Yes, sir.

"Q. Did you tell us that being cleared for landing No. 2 is a landing clearance, a final landing clearance? A. If they mention that word, it is.

"Q. You say it was a final landing clearance, the clearance that told you you were cleared to land on runway 3, behind another plane, or No. 2, as I think you used it? A. No. 2. That was all.

"Q. No. 2. You have no way of knowing whether that plane you told us you saw when you were on downwind leg was the

pattern, leaving the pattern, departing from it—and note my language—the unauthorized stepping out of the pattern, leaving the pattern, departing from it, would be a violation of law, because the pattern is prescribed by rule which has the force and effect of law. And so, therefore, unauthorized action of the character I have just referred to would be negligence, as I have defined that term to you, and would be, as we lawyers say, negligence *per se*, in other words, would be negligence as a result of the very act itself and no further proof would be necessary. This is the negligence, in this aspect of the case, which the plaintiff alleges against Eastern. * * *"

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plane you later saw on the landing strip or not, do you? A. I saw the craft, and I assumed it was the No. 1, sir.

"Q. That plane you told us you saw as you were on downwind leg, west of the tower— A. Before.

"Q. Then you told us when you got down south, when you were turning on base leg, you noticed a plane that was landing or had landed—I think you used the expression— A. Yes.

"Q. —on the landing strip. A. Yes.

"Q. It was actually on the ground? A. Yes, sir.

"Q. You had no way of knowing from that distance of five or six miles away, did you, whether that was the same plane you had previously seen, or some other plane, did you? A. I don't know exactly. But I saw more or less the same airplane.

"Q. And you never tried to contact the tower to inquire whether or not the plane you had seen on final approach, as you call it, when you were on downwind leg, was the plane that was No. 1, did you? A. But how am I going to ask the tower that? Am I going to say 'Is the plane I am seeing No. 1?' How is the tower going to know what plane I am seeing? There was no reason of calling back to the tower.

"Q. It would have prevented this accident, wouldn't it, if you had called the tower and inquired as to the identity of the plane ahead of you? A. Except that I happened to observe this plane on final approach, not any other plane. Therefore I assumed this was the No. 1. This was the only one on final approach.

"Q. And that is where the trouble came in, because you assumed that was the plane that was ahead of you, isn't it, Captain? A. Probably, sir."

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In insisting the court erred in admitting the traffic pattern as an exhibit and in instructing the jury that it was a binding regulation and that an unauthorized deviation from the pattern would be negligence *per se*, Eastern relied on the fact that the traffic pattern had not been published in the Federal Register and cited *Hotch* v. *United States*, 9 Cir., 1953, 208 F. 2d 244, 250, as authority that it was therefore not a binding regulation. The pattern had been officially prescribed, however, and Eastern had actual knowledge of it. In those circumstances we think the pilots of the DC–4 were required to follow the pattern and, since it is obviously a safety measure to some extent, the court correctly charged the jury that an unauthorized departure from it was negligence *per se*.

It is undisputed that the Eastern plane did leave the traffic pattern and circled into it again on final approach to the runway. Its departure from the pattern was not negligence if the tower had cleared the plane to land. Conceiving that an issue of fact had been developed as to whether the DC–4 had been cleared to land, the trial judge submitted that question to the jury and authorized it to return a verdict against Eastern if it should determine landing clearance had not been given,—that the Eastern plane had not been authorized by the tower to leave the traffic pattern as it did.

Whether this was error, as Eastern contends, depends on whether there was substantial evidence showing the DC–4 had not been cleared to land. On this charge of negligence against Eastern, as on all others, the burden of proof lay on the appellees. As substantial evidence sustaining the burden and showing the DC–4 had not been cleared to land when it deviated from the pattern, they rely upon (a) their contention that the Eastern plane was late and, in order to make up time, short-cut the pattern without authority; (b) the testimony of Captain Ator;

and (c) the testimony of Lt. Shaw. We consider those points in the order named.

(a) Even if it be conceded that the Eastern plane was late, it by no means follows that its pilots attempted an unauthorized landing to make up time. The point is without substantial weight as evidence of lack of landing clearance to the DC–4.

(b) Appellees further argue that, if Eastern was given any clearance, it was to land after the P–38; and in support of the suggestion they point to the testimony of Captain M. D. Ator, the check pilot of American Flight No. 1, which at the time of the crash was at the south end of runway 3 waiting to take off. Ator said his plane was informed by the tower ground control that it could take off after an eastern DC–4 had landed. On the basis of this evidence, appellees argue as follows:

> "* * * According to Tigner, he cleared Eastern to land first and the P–38 to follow Eastern. But if Ator was to take off after Eastern landed, he would have conflicted with the P–38. Thus the Ator testimony indicates that if Eastern was cleared, it was to land after the P–38."

The argument rests on a false premise. Tigner did not testify that he cleared the P–38 to land. He testified that he told the P–38 it was "No. 2 to land on runway 3." This did not authorize it to leave the traffic pattern and descend. That it was No. 2 *to land* does not mean that Ator could not take off before it was cleared to land and after Eastern landed. In any event this testimony of Ator is insufficient to furnish a basis for a finding that if Eastern was cleared to land it was to be after the P–38.

(c) Lt. Meredith D. Shaw, co-pilot, was flying a National Airlines DC–4 en route from New York to Washington on the morning of November 1, 1949. The pilot, Captain Porter, was handling the radio. Shaw testified that when he was over Beltsville, Maryland, he heard the Eastern plane report by radio to the tower, giving its position and trip number; and heard the tower clear it to enter the left traffic pattern for runway 3. Immediately afterward, at approximately 11:42 or 11:43 a. m., he said his own plane was also cleared to enter the left traffic pattern for runway 3, but was told to check again with the tower when over Hains Point. He reached Hains Point at 11:45 or 11:46, and at that time heard another radio communication which said, "Eastern, traffic, a P–38," with a direction added which he did not remember. Shaw testified he did not at any time hear any clearance to Eastern to land, although he had earphones on continuously[5] and was on tower frequency, just as Eastern was.

To the contrary, Tigner testified positively that he cleared the DC–4 to land, after which it swung from the pattern in a wide turn to approach runway 3. He adhered to that statement despite vigorous cross-examination. Tigner further said the Eastern DC–4 followed his instructions throughout the entire flight. The first notice to Eastern that the P–38 was in the air was a few seconds before the impact when the tower said, "Eastern 537, make an immediate left turn. Traffic is P–38 above and behind you." Instantly responding to this direction, the engines of the DC–4 roared and the plane began a left turn but was struck before it could escape.

Thus the question is whether Shaw's negative testimony that he heard no landing clearance given Eastern had

[5] He qualified this statement somewhat by saying that, from the time he was over Beltsville until his plane landed, "to the best of my recollection I never took off the headset."

enough probative value, as against Tigner's affirmative statement that he gave the clearance, to form an issue of fact for the jury.

It is generally held in railroad crossing cases that negative testimony of a witness that he did not hear a warning signal from a locomotive is sufficient to form an issue of fact, in the face of affirmative evidence that the warning was sounded, provided the witness was in a position to hear, and provided his attention was not distracted. A different situation is presented, however, when the witness is shown not to have been in a position to hear or appears to have been inattentive. The testimony of such a witness that he did not hear the warning signal has little or no probative force. *Small* v. *Pennsylvania R. Co.*, 1935, 65 App. D. C. 112, 80 F. 2d 704; *Strider* v. *Pennsylvania R. Co.*, 6 Cir., 1932, 60 F. 2d 237; *Venchik* v. *Pennsylvainia R. Co.*, 1941, 143 Pa. Super. 465, 18 A. 2d 118; *Lanier* v. *Missouri P. R. Co.*, 1929, 9 La. App. 586, 119 So. 710; *Zotter* v. *Lehigh Valley R. Co.*, 1924, 280 Pa. 14, 124 A. 284; *Jensen* v. *Oregon Short Line R. Co.*, 1922, 59 Utah 367, 204 P. 101; *Rickert* v. *Union P. R. Co.*, 1916, 100 Neb. 304, 160 N. W. 86; *Young* v. *Erie R. Co.*, 1913, 158 App. Div. 14, 143 N Y. S. 176; *Jordan* v. *Osborne*, 1911, 147 Wis. 623, 133 N. W. 32; *Hubbard* v. *Boston & A. R. Co.*, 1893, 159 Mass. 320, 34 N. E. 459. Under the rule just stated Shaw's negative testimony was insufficient to form an issue if he either (a) was not in a position during all the crucial nine-minute period to hear messages sent from the tower to the Eastern plane;[6] or (b) appears not to have been attentive to all tower broadcasts during that period.

It is an unquestioned and unquestionable fact that Shaw was not in a position to hear messages from the tower

[6] The period from 11:38 a. m., when Eastern was cleared into the pattern, until 11:46–11:47 a. m., when the crashed occurred.

during all the critical nine-minute period. He testified that, when the radio switch button was depressed for transmission from his plane, incoming messages on that frequency could not be heard by him or Captain Porter. Consequently, whenever the latter called the tower during the nine-minute period, or depressed the switch button for that purpose, it was impossibe for him or Shaw to hear a message broadcast from the tower to Eastern.

Captain Porter did not turn his radio selector to the tower until approximately 11:42 or 11:43. It follows that Shaw's plane was on tower frequency only during the last four or five minutes of the critical nine-minute period. The evidence is not clear as to when and how often during that brief period Porter depressed the switch button to call the tower and so shut off Shaw's ability to hear a message from the tower to Eastern.

In this connection it is to be noted that Shaw could not have heard the tower clearing Eastern to enter the left traffic pattern, which he said he heard at approximately 11:42 or 11:43 while he was over Beltsville. This is so because the parties agreed and stipulated that Eastern received traffic pattern clearance at 11:38 a. m.—the exact time at which Shaw unequivocally said he was over the Baltimore relay about 15 miles northwardly from Beltsville,[7] with his radio not yet tuned to the tower. It is therefore clear that Shaw did not hear—as he said and

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[7] He was positive of that time and said the times of all other incidents thereafter to which he testified were fixed by him through arithmetical computations based on his presence at the Baltimore relay at 11:38 a. m.

He described the Baltimore relay as "a radio fixing where two beams meet • • • when you get a solid hum," which is approximately 15 miles northwardly from the Beltsville fan marker. The latter is a 75-megacycle transmitter just slightly northeast of Beltsville, Maryland. It makes a fan-shaped transmission into the air, by which planes are informed they are at Beltsville.

no doubt thought he did—the tower clear Eastern to enter the traffic pattern.

What, then, did Shaw hear at approximately 11:42 or 11:43 a. m.? Tigner testified that at approximately 11:44 a. m. he cleared Eastern to land. Since both Shaw and Tigner were approximating the time, it may well have been that Shaw heard the landing clearance given at that time and inadvertently mistook it for traffic pattern clearance.[8] As we have said, it is certain he did not hear Eastern's clearance for the pattern. It follows that Shaw's statement that he heard no landing clearance to Eastern is unconvincing.

Moreover, Shaw's general situation was not conducive to careful attention, as he was operating the controls of his plane as it came over Beltsville to Hains Point and to the airport. The pilot, Captain Porter, was therefore primarily responsible for radio communications during that time. Shaw was handling the controls of a huge airplane and knew his colleague was charged with the duty of sending and receiving radio messages. We cannot attribute to him undivided attention to tower broadcasts to other planes, although he may have had earphones on. This is not to say he could not hear the communications he said he heard; but that he was not in the favorable attitude of one whose negative testimony is for that reason held to make an issue of fact.[9]

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[8] We observe that in a statement given March 4, 1950, to an investigator of the CAB in Miami, Florida, Shaw said he "heard the tower giving Eastern landing clearance." To be sure, he testified that in making the statement he had misused the term "landing clearance." But whether he in fact misused the term "landing clearance" in describing the clearance he heard, is open to serious question because, as we have shown, he could not have heard the actual traffic pattern clearance which was given earlier to Eastern.

[9] Captain Porter did not testify.

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As to whether his testimony shows he listened carefully to the messages sent to Eastern by the tower—an illustration will be indicative: After testifying that at 11:45 or 11:46 he heard the tower say, "Eastern, traffic, a P–38," Shaw said, "And at that point he gave them a direction; but the direction didn't register." (By "direction" he said he meant the position of the P–38.) The direction of the Bolivian plane given to Eastern by the tower "doesn't stick in my mind," he said, although he remembered that a direction was given. The full message was stated thus by Tigner, who sent it: "Eastern 537, make an immediate left turn. Traffic is P–38 above and behind you." (Tigner is corroborated by other tower operators and also by undisputed evidence that thereupon Eastern began an immediate left turn.) So, Shaw's possible inattention is shown by the fact he heard only part of the message, and remembered only part of what he heard.

All these considerations show the inadequacy of Shaw's negative testimony; that his claimed failure to hear Tigner clear Eastern to land was due to the depression of the switch which cut off radio reception, or due either to inattention or misinterpretation, and was not enough to raise an issue of fact for the jury as to whether the DC–4 had left the traffic pattern without tower authority to do so.

The negative testimony is weakened further by the fact that, because of the human instinct of self-preservation and the disposition of men to avoid personal harm, Eastern's dead pilots are presumed to have acted with diligence and due care. *Atchison, T. & S. F. R. Co.* v. *Toops*, 1930, 281 U. S. 351, 356, 50 S. Ct. 281, 74 L. Ed. 896; *Looney* v. *Metropolitan R. Co.*, 1906, 200 U. S. 480, 488, 26 S. Ct. 303, 50 L. Ed. 564; *Campbell* v. *District of Columbia*, 1935, 64 App. D. C. 375, 78 F. 2d 725; *Baltimore & P. R. Co.* v. *Carrington*, 1894, 3 App. D. C. 101; *Bratt*

v. *Western Air Lines,* 10 Cir., 1948, 169 F. 2d 214, 216; *Northern Pac. R. Co.* v. *Spike,* 8 Cir., 1903, 121 F. 44, 47. It has been said the presumption "rises to the dignity of evidence." *United States* v. *Fotopulos,* 9 Cir., 1950, 180 F. 2d 631, 637.

As we said in *Universal Airline, Inc.* v. *Eastern Air Lines, Inc.,* 1951, 88 U. S. App. D. C. 219, 188 F. 2d 993, it is not for us to substitute our views for those of the trier of fact in the District Court when there is conflicting evidence. But here, as in that case, the evidence concerning the crucial fact is without substantial conflict. Affirmative testimony that the Eastern plane was cleared to land was not countered by evidence sufficient to form a factual issue; hence the appellees failed to carry their burden of showing the contrary by a preponderance of the proof. The intervention of the jury is required only where some question of fact is actually in controversy. *Oscanyan* v. *Arms Co.,* 1880, 103 U. S. 261, 266, 26 L. Ed. 539.

While there were other charges of negligence against Eastern which were submitted to the jury, certainly the principal accusation was that it attempted to land without having been cleared by the tower to do so. Since the trial court simply asked the jury, "Is Eastern Air Lines liable?" and the jury simply answered, "Yes," we do not know in what way its members considered Eastern had been negligent; but we do know the jury was authorized by the court to find against the Air Lines if it should conclude the DC–4 had not received landing clearance. We are therefore forced to hold the trial court erred in submitting to the jury the question whether the Eastern plane unauthorizedly deviated from the traffic pattern. Having so held, we think it unnecessary to discuss the other grounds for reversal advanced by Eastern Air Lines. The judgments against it will be reversed, and the cases will be remanded for a new trial.

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III

The principal question presented by the Government's appeal is whether the United States has consented to be sued for negligence of its control tower employees in regulating air traffic at a public airport. In answering the question, we must construe the Federal Tort Claims Act which limits the liability of the United States to that which a "private individual" would have "under like circumstances,"[10] and excludes claims arising from the performance of a discretionary function or duty.[11]

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[10] 28 U. S. C. § 1346(b) and § 2674 are as follows:

§ 1346(b). "Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

§ 2674. "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

"If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, § 1, 62 Stat. 983."

[11] The pertinent portion of 28 U. S. C. § 2680 is as follows:

"The provisions of this chapter and section 1346(b) of this title shall not apply to—

"(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execu-

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The Government insists that its tower operators perform governmental functions of a regulatory nature; that no private individual has such power of regulation; that therefore the Act does not permit suit based on negligent performance of their duties. The situation involved here, says the Government, when viewed in all the circumstances, "cannot be equated to one which would predicate analogous private liability," and so it is said the claims are excluded from the coverage of the Tort Claims Act.

The history of the development of the control tower is helpful in considering whether there is or may be private liability analogous to that sought to be imposed upon the United States in this case. What is said to be the forerunner of the present control tower was constructed in 1931 at an airport in Cleveland, Ohio. During the following five years 20 other cities erected and operated towers, and by 1939 there were 52 towers being operated by municipalities.

Regulations promulgated under the Civil Aeronautics Act of 1938 provided for the issuance of certificates of competence to tower operators; and standard procedures, equipment, installations and tower operating techniques were suggested, but were not required to be adopted. November 1, 1941, the CAA issued a *Manual of Operations* setting forth Standard Airport Traffic Control Procedures, and shortly thereafter all certificated tower operators were required to apply them.

In August, 1941, Congress appropriated funds to enable CAA to maintain and operate a number of towers. Through gradual increase in funds available, the CAA

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tion of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

was operating 165 of the country's 200 towers on November 1, 1949, the date of the accident involved here. As late as April, 1954, there were still a number of towers in operation which had not been taken over by CAA personnel. The operators in those non-Government towers must be certificated by CAA before they may control civil aircraft in air commerce.[12] Such towers are subject to CAA inspection;[13] and the Administrator of Civil Aeronautics has prescribed procedures and techniques which must be followed by the towermen. Nevertheless, these non-CAA controllers are not government employees, and perform no governmental function.

Airports are usually constructed, maintained and operated by municipalities, probably because the cost of construction is great and the prospect of financial reward does not attract private capital. But, as far as we know, as of November 1, 1949, there was no reason why a private individual or a private corporation could not construct an airport and operate a control tower manned by its own operators certificated by the CAA. Such an individual or corporation would of course be liable for the negligence

[12] 49 U. S. C. A. § 401(6) includes within its definition of an *airman* "any individual who serves in the capacity of • • • air-traffic control-tower operator." And 49 U. S. C. A. § 560(a) (2) prohibits any person from serving as an airman in any capacity without an appropriate certificate to so serve. To be eligible for a control tower operator certificate an applicant must meet physical, experience and other qualifications and must pass an examination on the subject of air traffic control. 14 Code Fed. Regs. Part 26.

[13] 49 U. S. C. A. § 556 is as follows:

"The Administrator of Civil Aeronautics is empowered to inspect, classify, and rate any air navigation facility available for the use of civil aircraft of the United States, as to its suitability for such use. The Administrator of Civil Aeronautics is empowered to issue a certificate for any such air navigation facility."

of privately employed tower operators. It follows that, when the United States entered the business of operating a civil airport and an air traffic control tower in connection therewith, it assumed a role which might be and was assumed by private interests. Hence, under 28 U. S. C. §§ 1346(b) and 2674, the Government is liable for the negligent acts or omissions of its control tower operators in the performance of their functions and duties, unless those Code provisions do not apply because the operators' activities are of the sort described in the exceptions subsection, § 2680(a).

The United States insists that the subsection applies, and shields it from liability here. It argues that § 2680(a)

> "• • • incorporates into the Act the historic principle that the courts will not, in a private action, revise or review executive conduct involving the exercise of judgment or discretion of a public character";

that the tower operators' duties are public in nature and involve the exercise of discretion and judgment, with the result that neither the operators nor the United States can be held liable for their negligent performance.

The principle referred to is indeed historic, as it was stated in *Marbury* v. *Madison,* 1803, 1 Cranch 137, 169-170, 5 U. S. 137, 169-170, 2 L. Ed. 60, and has since been consistently adhered to. We have no doubt that the principle was consciously restated by Congress when it declared in § 2680(a) that the United States should not be liable on

> "Any claim • • • based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal

agency or an employee of the Government, whether or not the discretion involved be abused."

The heart of the question, however, is whether this case falls within the historic principle; whether the Government is correct in saying, as the second step in its argument, "that the tower operators' duties are public in nature and involve the exercise of discretion and judgment." We think the statement is incorrect, for the reasons hereinafter given. We hold that the tower operators merely handle operational details which are outside the area of the discretionary functions and duties referred to in § 2680(a); and that, consequently, the Tort Claims Act permits the Government to be sued for damages sustained because of their negligence.

Applicable authority is available to sustain our view, as comparable questions have been considered by other courts. *Costley* v. *United States,* 5 Cir., 1950, 181 F. 2d 723, involved the question whether the Tort Claims Act permitted the Government to be sued for the negligence of its employees in an army hospital. A master sergeant's wife was admitted to the maternity section. As an incident to delivering her child, employees of the United States prepared and injected into her body a drug which was intended to be a spinal anaesthetic but in fact was a very harmful substance which caused the woman to be permanently paralyzed from the waist down.

The question on appeal from the District Court's dismissal was whether the employees were under a duty to use due skill and reasonable care in attending Mrs. Costley after having admitted her to the hospital under an army regulation authorizing her admission, or whether they were performing a discretionary duty or function which, under § 2680(a), cannot be made the basis of a tort claim against the Government. The Court of Ap-

peals quoted the army regulation that wives of soldiers may be admitted to army hospitals when suitable facilities for hospitalization are available, and then said, 181 F. 2d at page 725:

> "With facilities available for her care, Mrs. Costley was admitted to the hospital pursuant to the above regulation. Having decided that there were facilities available, and having admitted her for treatment, the hospital authorities no longer had any discretion to exercise with regard to whether she was to receive careful or negligent treatment. A duty arose at this point to treat her with the same care, skill, diligence, and ability, that would be owing by a private person or corporation under the same or similar circumstances."

In accord are *Somerset Seafood Co.* v. *United States,* 4 Cir., 1951, 193 F. 2d 631, and *United States* v. *Gray,* 10 Cir., 1952, 199 F. 2d 239. Judge Dobie's *Somerset* opinion sufficiently distinguishes *Feres* v. *United States,* 1950, 340 U. S. 135, 71 S. Ct. 153, 95 L. Ed. 152, by saying, 193 F. 2d at page 634:

> "* * * All that case really decided was the 'Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries (arose) out of or are in the course of activity incident to service.'"

The holding of the *Costley, Somerset* and *Gray* cases was neither overruled nor impaired by the later decision of the Supreme Court in *Dalehite* v. *United States,* 1953, 346 U. S. 15, 73 S. Ct. 956, 97 L. Ed. 1427.[14] That was a

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[14] The Government says the *Somerset Seafood Co.* case was overruled by the *Dalehite* opinion. We think not; our analysis of that opinion convinces us to the contrary.

test case representing some 300 separate personal and property claims aggregating $200,000,000 which were based on explosions of fertilizer with an ammonium nitrate base, at Texas City, Texas, in 1947. Suing under the Tort Claims Act, the plaintiffs claimed negligence substantially on the part of the entire body of federal officials and employees involved in a program of production of the material—Fertilizer Grade Ammonium Nitrate (FGAN)—in which the original fire occured and which exploded. This fertilizer had been produced and distributed at the instance, according to the specifications, and under the control of the United States.

The question before the Court was whether the acts and omissions alleged as negligence were done or omitted in th performance of or failure to perform a discretionary function or duty within the meaning of § 2680(a). The Court said, 346 U. S. at page 34, 73 S. Ct. at page 697:

> "* * * The 'discretion' protected by the section * * * is the discretion of the executive or the administrator to act according to one's judgment of the best course, a concept of substantial historical ancestry in American law."[15]

The statement just quoted was supported in 73 S. Ct. at page 967, by footnote 30, which is as follows:

> "It seems sufficient to cite Marbury v. Madison, 1 Cranch 137, 170, 2 L. Ed. 60; Spalding v. Vilas, 161 U. S. 483, 498, 16 S. Ct. 631, 637, 40 L. Ed. 780; Alzua v. Johnson, 231 U. S. 106, 34 S. Ct. 27, 58 L. Ed. 142;

[15] This is the "historic principle," referred to in the Government's brief, about which there can be no dispute. But, as we have said, the real question here is whether tower activities fall within the principle.

State of Louisiana v. McAdoo, 234 U. S. 627, 663, 34 S. Ct. 938, 940, 58 L. Ed. 1506; Perkins v. Lukens Steel Co., 310 U. S. 113, 131, 60 S. Ct. 869, 878, 84 L. Ed. 1108."

The Court went on to say, 346 U. S. at pages 35 and 36, 73 S. Ct. at page 968:

> "It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. * * *"

It was then pointed out that the Cabinet-level decision to institute the fertilizer export program was a discretionary act; that the basic "Plan" for the production of FGAN was drafted by the Office of the Field Director of Ammunition Plants in June 1946, prior to beginning production. It was further stated that each of the specific acts of negligence charged in the manufacture of FGAN was in accordance with and done under specifications and directions set forth in the basic Plan for the production of fertilizer. Each of the acts looked upon as negligence was directed by this Plan. The Court concluded as follows, 346 U. S. at page 42, 73 S. Ct. at page 971:

> "In short, the alleged 'negligence' does not subject the Government to liability. The decisions held culpable were all responsibly made at a planning rather than operational level and involved considera-

tions more or less important to the practicability of the Government's fertilizer program."

We may fairly infer from the statement just quoted that the United States is liable for the negligence of its employees at the operational level, where there is no "room for policy judgment and decision." This leads us to the Government's argument that the negligence charged against the tower operators is the same as that charged against the Coast Guard in the *Dalehite* case, which the Supreme Court held was not actionable because of the discretionary exception. We quote in the margin the Supreme Court's disposition of the alleged negligence of the Coast Guard.[16]

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[16] 346 U. S. at pages 42-43 and 44, 73 S. Ct. at pages 971-972:

"The findings of negligence on the part of the Coast Guard in failing to supervise the storage of the FGAN, and in fighting the fire after it started, were rejected by a majority of the Court of Appeals. [*Dalehite* v. *United States*, 5 Cir.] 197 F. 2d at 777, 780, 781. We do not enter into an examination of these factual findings. We prefer, again, to rest our decision on the Act.

"The District Court's holding that the Coast Guard and other agencies were negligent in failing to prevent the fire by regulating storage or loading of the fertilizer in some different fashion is like his specific citations of negligence discussed above. They are classically within the exception. 'The power to adopt regulations or by-laws * * * for the preservation of the public health, or to pass ordinances prescribing and regulating the duties of policemen and firemen * * * are generally regarded as discretionary, because, in their nature, they are legislative.' *Weightman* v. *Corporation of Washington*, 1 Black 39, 49, 17 L. Ed. 52. The courts have traditionally refused to question the judgments on which they are based. *Zywicki* v. *Jos. R. Foard Co.*, D. C., 206 F. 975; *Gutowski* v. *Mayor of Baltimore*, 127 Md. 502, 96 A. 630; *State of Maryland to use of Goralski* v. *General Stevedoring Co.*, D. C., 213 F. 51.

"As to the alleged failure in fighting the fire, we think this

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The Court made it clear that, as far as the alleged official dereliction of duty in failing to police the shipboard loading was concerned, the decision not to do so had been made at a policy-forming level and was not the decision of the individual members of the Coast Guard whose duty it would have been to do the policing had they been instructed to do it. The Court said:

> "• • • To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease."

We may paraphrase the quoted sentence thus:

> "To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for the failure of the CAA to take over for maintenance and operation a certain air traffic control tower."

Had the Coast Guard authorities decided to supervise the storage, we have no doubt the United States would have

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too without the Act. The Act did not create new causes of action where none existed before.

"'• • • the liability assumed by the Government here is that created by "all the circumstances," not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities.' *Feres* v. *United States*, 340 U. S. 135, 142, 71 S. Ct. 153, 157, 95 L. Ed. 152.

"It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. • • • To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease."

been liable in tort for any causal negligence of its personnel acting at the operational level. So it is here: discretion was exercised when it was decided to operate the tower, but the tower personnel had no discretion to operate it negligently.

The distinction between non-actionable planning and actionable negligence in carrying out the plan, was clearly stated by the Supreme Court in *Johnston* v. *District of Columbia*, 1886, 118 U. S. 19, 6 S. Ct. 923, 30 L. Ed. 75. Johnston's property was damaged when a sewer overflowed. He sued the District of Columbia, alleging that it "knowingly constructed and continued upon an unreasonable and defective plan, and of inadequate capacity for its purpose, and wrongfully permitted [it] to become clogged up." The Court said, 118 U. S. at pages 20-21, 6 S. Ct. at page 924:

> "The duties of the municipal authorities, in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a *quasi* judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience throughout an extensive territory; and the exercise of such judgment and discretion, in the selection and adoption of the general plan or system of drainage, is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land. But the construction and repair of sewers, according to the general plan so adopted, are simply ministerial duties; and for any negligence in so constructing a sewer, or keeping it in repair, the municipality which has constructed and owns the sewer may be sued by a person whose property is thereby injured."

With this distinction in mind, we turn to the trial court's opinion and find the following statement as to the nature of the acts and omissions of the tower operators which were held to constitute negligence:

> "• • • As to negligence, I find that there was failure of the control tower personnel to issue a timely warning to the Eastern plane as to the P–38 being on final approach; in the failure, also, to warn the P–38 that Eastern was on final approach; in clearing both planes for the same runway at approximately the same time, having in mind their respective positions in relation to each other and the speed of both their approach and descent; and the failure to keep both planes advised as to the activities of the other; I find this to be negligence and concurrent both in character and in relation to that found by the jury with respect to the defendant Eastern. I find, further, that such negligence contributed proximately to the injury complained of."

The three negligent omissions and the one affirmative negligent act found by the court were not "decisions responsibly made at a planning level" and did not involve any consideration important to the practicability of the Government's program of controlling air traffic at public airports. The tower operators acted, and failed to act, at an operational level. While they were in a sense exercising discretion as to what they should and should not do, they were not performing the sort of discretionary functions contemplated by § 2680(a) and clearly described in the *Dalehite* decision.

It is therefore our opinion that, if a Government towerman negligently clears two planes to land on the same runway at the same time, or is guilty of some other negligent act or omission in doing his work, the Govern-

ment is liable for resulting injury in the same manner and for the same reason that it is liable for injury done by the driver of a mail truck who, in exercising discretion as to how to drive, negligently runs through a red traffic light.

The Government contends, however, that even though its theory of non-liability under § 2680(a) be rejected, the judgments against it should be reversed because the trial court's findings do not provide sufficient factual bases for its ultimate conclusion of negligence. We deem it unnecessary to do more than quote the pertinent findings of fact, which expanded the above quotation from the trial court's opinion:

> "3. At all times in question, there was available in good operating condition in the control tower at said airport and in each plane voice radio equipment for two-way contact between said tower and either plane or between the tower and both planes simultaneously.
>
> "4. For an adequate period of time before the collision, both planes were visible to the control tower personnel who observed said planes and knew that said planes were on converging approaches for landing on runway 3, and said personnel had an adequate opportunity to give timely warnings and instructions to each plane.
>
> "5. At all times in question, weather conditions at and near the airport were excellent and visibility unimpeded.
>
> "6. At all times in question, the Washington National Airport and the control tower facilities thereat were owned by the defendant, United States of America, and were being operated by it through its agents

and employees (the tower personnel) assigned thereto by the Civil Aeronautics Administration, an agency of the United States.

"7. The said agents and employees of the United States in their operation of the control tower at said airport failed to exercise reasonable care and were guilty of negligence in the circumstances in question in that, having in mind the respective positions of said planes in relation to each other and their speed of approach and descent:

"a) they failed to issue a timely warning to the Eastern plane concerning the P–38 on final approach;

"b) they failed to warn the P–38 that the Eastern plane was on final approach;

"c) they cleared both planes for the same runway at approximately the same time; and

"d) they failed to keep both planes advised of the activities of the other.

"8. The negligence of United States through its agents and employees, as set out in finding No. 7 above, was a proximate cause of the fatal collision resulting in the deaths of plaintiffs' decedents, and such negligence of the United States also concurred with the negligence of Eastern as the proximate cause of said collision.

"9. The collision occurred over the Potomac River within the boundary of the District of Columbia."

These findings seem to us to be sufficiently in detail to justify the conclusion of negligence.

It is observed that the Government does not directly charge that the evidence is insufficient to support the findings of fact which were made by the trial judge. We have

considered the question, however, and have concluded there was proof adequate to support the findings, although it is meager with respect to the finding that the tower cleared both planes for the same runway at approximately the same time—which is probably the most important of the findings. For, although the trial court was amply justified in finding (contrary to the jury's apparent conclusion) that the Eastern plane was cleared to land—and indeed could hardly have found otherwise,—there is only slight evidence tending to show the Bolivian plane was ever cleared to land.

Bridoux himself practically conceded his own negligence (of which the jury rather unaccountably exonerated him) in mistaking the message "You are No. 2 to land" for actual and absolute landing clearance. But he did say: 'I said 'Washington Tower, Bolivian P–38 on final approach.' They responded to me immediately. • • • 'Bolivian P–38, prepare to land on runway 3.'" Consequently, if the trial judge believed, as apparently he did, that Bridoux actually sent such a message and received such an answer from the tower, there was some evidence that the tower gave landing clearance to the Bolivian as well as to the DC–4. We cannot substitute our judgment on a actual issue for that of the trial judge simply because we might have reached a different conclusion.

As to all the foregoing, the court is unanimous. We are divided, however, as to another contention of the United States which remains to be considered: that it was error to measure the Government's liability under the law of the District of Columbia,[17] which does not limit the amount of damages for wrongful death, instead of under the law of Virginia, which limits recovery to $15,000 for

[17] The trial judge found from conflicting evidence that the accident occurred over the Potomac River, which is in the District of Columbia.

the death of one person. The contention is based on the fact, that although the planes collided in the District of Columbia, the negligent acts and omissions of the tower operators occurred in the tower, which is in Virginia.

The general conflicts rule disregards the law of the place of the negligent act or omission and, instead, uses the law of the place where the injury was sustained. My brothers Edgerton and Fahy are of the view that the trial court erred in applying the general rule here because the Tort Claims Act provides in § 1346(b) that

> "* * * the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for * * * death caused by the negligent or wrongful act or omission of any employee of the government * * * under circumstances where the United States, if a private person, would be liable to the claimant in accordance with *the law of the place where the act or omission occurred*." (Emphasis supplied.)

They hold that Congress thus provided in explicit terms for the Government's liability to be measured under the law of the place where its negligent employee's act or omission occurred, and that therefore the Act requires Virginia law to be applied in this case.

I do not agree that the language of § 1346(b) compels us to conclude that Congress had in mind the general conflicts rule to which reference has been made and intended to make it inapplicable in situations such as this. I think the legislative expression "in accordance with the law of the place where the act or omission occurred" was intended to mean, and therefore should be construed as meaning, "in accordance with the law of the place where the tort occurred." An act, in legal as well as in popular use; is not merely a voluntary muscular contraction, but

something more. The word commonly includes the consequences of the muscular contraction. If the defendant pulls the trigger and the bullet kills a man, in legal as in popular usage the killing is said to be the defendant's act.

In accordance with this usage, I interpret the statutory words "act or omission" as including not only the messages negligently sent or omitted by the tower operators, but also their immediate consequences. This is consistent with § 377 of Restatement, Conflict of Laws (1934), which reads: "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."

My interpretation also accords with that indicated by Assistant Attorney General Shea in his testimony before the House Committee on the Judiciary concerning the Tort Claims bill,[18] as being the then interpretation of the Department of Justice. He said, when asked where a claimant brings suit, "Either where the claimant resides, or *in the locale of the injury or damage.*" (Italics supplied.) The witness was referring to the venue provision of the then pending legislation which is now 28 U. S. C. § 1402(b):

> "(b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred. June 25, 1948, ch. 646, § 1, 62 Stat. 937."

The words of § 1402(b) which he was construing are not only the same words which occur in § 1346(b), with which

[18] Hearings before the House Committee on the Judiciary, 77th Cong., 2nd Sess., on H. R. 5373 and H. R. 6463 (Jan. 29, 1942), p. 9.

we are concerned, but also were used with a direct reference to that section.

The judgments against the United States will be affirmed, except that the judgment for $150,000 in No. 12,017 will be reduced to $15,000 to meet the limitation imposed by the law of Virginia on the amount of recovery.

The judgments in Nos. 11,991 and 11,992 are reversed and the cases are remanded for a new trial restricted to the issue of liability. The judgment in No. 12,017 is affirmed as modified and the judgment in No. 12,018 is affirmed.

Per Curiam Decision of United States Supreme Court Dated December 5, 1955, *United States* v. *Union Trust Co. et al.*

OCTOBER TERM 1955

PER CURIAM DECISION—December 5, 1955

(350 U. S. 907)

No. 296. *United States* v. *Union Trust Co. et al.* On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. PER CURIAM: The petition for writ of certiorari is granted and the judgment is affirmed. *Indian Towing Co.* v. *United States*, 350 U. S. 61. Solicitor General Sobeloff, Assistant Attorney General Burger, Paul A. Sweeney and Lester S. Jayson for the United States. David G. Bress, Sheldon E. Bernstein, Alvin L. Newmyer and Jo V. Morgan, Jr. for respondents. Reported below: 95 U. S. App. D. C. 189, 221 F. 2d 62.

Per Curiam Decision of United States Supreme Court Dated December 5, 1955, *Union Trust Co. et al.* v. *Eastern Air Lines, Inc.*

OCTOBER TERM 1955

PER CURIAM DECISION—December 5, 1955

(350 U. S. 907)

No. 298. *Union Trust Co. et al.* v. *Eastern Air Lines, Inc.* On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. PER CURIAM: The petition for writ of certiorari is granted and the judgment is reversed. MR. JUSTICE FRANKFURTER and MR. JUSTICE HARLAN would not grant certiorari. David G. Bress, Sheldon E. Bernstein, Alvin L. Newmyer and Jo V. Morgan, Jr. for petitioners. Joseph W. Henderson, Richard W. Galiher and John M. Aherne for respondent. Reported below: 95 U. S. App. D. C. 189, 221 F. 2d 62.

Per Curiam Decision of United States Supreme Court Dated February 27, 1956, *Union Trust Co. et al.* v. *Eastern Air Lines, Inc.*

PER CURIAM DECISION—February 27, 1956

(350 U. S. 962)

No. 298. *Union Trust Co. et al.* v. *Eastern Air Lines, Inc.* On consideration of the petition for rehearing, the order of December 5, 1955, is reopened and is modified by directing that the case be remanded to the Court of Appeals to permit that court to pass upon the several issues left undecided by our reversal of its judgment.

Opinion on Remand of Court of Appeals for the District of Columbia, Dated September 20, 1956

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 11,991 and 11,992

EASTERN AIR LINES, INC.,
Appellant,

v.

UNION TRUST CO., et al.,
Appellees.

Argued June 6, 1956

Decided Sept. 20, 1956

Petition for Rehearing In Banc Denied Jan. 9, 1957

Messrs. Joseph W. Henderson, Philadelphia, Pa., and *Richard W. Galiher,* Washington, D. C., with whom *Mr. John M. Aherne,* New York City, of the bar of the Supreme Court of New York, was on the brief, for appellant.

Mr. David G. Bress, Washington, D. C., with whom *Messrs. Sheldon E. Bernstein, Alvin L. Newmyer and Jo V. Morgan, Jr.,* Washington, D. C., were on the brief, for appellees.

Before EDGERTON, Chief Judge, and WILBUR K. MILLER and FAHY, Circuit Judges.

WILBUR K. MILLER, Circuit Judge: When these cases were first before us, we reversed the judgments against

Opinion on Remand of Court of Appeals for the District of Columbia, Dated September 20, 1956

Eastern Air Lines in an opinion to which reference is made for a statement of the factual situation. 1955, 95 U. S. App. D. C. 189, 221 F. 2d 62. We held that, since the pilot of a National airliner flying in the general vicinity was admittedly not in a position during all of the critical period to hear radio messages sent by the control tower to the Eastern plane, and since he appeared not to have been fully attentive to such tower broadcasts as he actually did hear during that period, the National pilot's negative testimony that he heard no landing clearance given the Eastern plane did not have enough probative value, as against the tower operator's affirmative statement that he gave such clearance, to form an issue of fact for the jury.

Having so held, we concluded the trial court erred in submitting to the jury the question whether the Eastern plane had negligently deviated from the traffic pattern without tower clearance to do so, when it was struck from above and behind by the Bolivian plane. Because of that conclusion, we reversed the judgments without reaching other grounds for reversal advanced by Eastern Air Lines.

There followed a petition for a writ of certiorari, with respect to which the Supreme Court said December 5, 1955, "The petition for writ of certiorari is granted and the judgment is reversed." 350 U. S. 907, 76 S. Ct. 192. On petition for rehearing by Eastern Air Lines, the Supreme Court ordered on February 27, 1956:

> "On consideration of the petition for rehearing, the order of December 5, 1955, *ante*, p. 907, is reopened and is modified by directing that the case be remanded to the Court of Appeals to permit that court to pass upon the several issues left undecided by our reversal of its judgment." 350 U. S. 962, 76 S. Ct. 429.

Thus the cases are again before us. Supplemental briefs have been filed and further oral argument has been heard.

Eastern Air Lines urges it was deprived of a fair trial by the plaintiff's "clear design to destroy the character, integrity and credibility of the tower witnesses by baseless charges of fabrication and concoction." The trial judge told the jury such charges had first been made and then withdrawn, and then charged in regard thereto: "So, therefore, I want to immediately have you dispel that from your minds, because counsel have said there is no charge of fabrication or concoction or subornation of perjury, if you will, in this case." While the record furnishes some basis for supposing the plaintiffs had the design attributed to them by Eastern, we think the court's admonition was adequate to remove any possible prejudice from the minds of the jurors if they were otherwise unprejudiced, and that reversal on this ground alone is not warranted.

Eastern says it was gravely prejudiced by the fact that the jury heard all the evidence in the non-jury case; that alleged fault on the part of the tower operators was imputed to it by the jury. Even though we assume that Eastern was disadvantaged because the cases against it and the non-jury cases against the Government were tried at the same time, Eastern for reasons then deemed prudent consented to consolidation of the cases for simultaneous trial. It cannot now complain because this was done.

In our first opinion we rejected Eastern's contention that the trial court erred in receiving in evidence the approach and landing pattern offered as an exhibit by the appellees because it had not properly been officially prescribed; and held the Eastern pilots were required to follow the pattern unless landing clearance, which authorizes deviation from it, had been given by the tower.

Eastern urges that we reconsider the ruling and hold the pattern inadmissible. We adhere to our original holding in this regard.

Finally, Eastern urges that the trial judge erred in denying its alternative motions for judgment *non obstante veredicto* or for a new trial, filed under Rule 50(b), Federal Rules of Civil Procedure.[1] The motion asked the court to set aside the verdicts in favor of Bridoux, the Bolivian pilot, as well as those against Eastern. The appellees moved for a new trial of their cases against Bridoux if a new trial were awarded to Eastern Air Lines.

The new trial issue includes the inquiry whether the verdicts were against the clear weight of the evidence, whether they were induced by passion, sympathy and prejudice, and whether a miscarriage of justice will result therefrom. These included inquires, particularly the latter, contain a combination of questions. One phase of

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[1] The pertinent portion of the Rule is as follows:

"(b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict • • • A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. • • •" 28 U. S. C. A.

resulting injustice is asserted by the appellant in this quotation from its supplemmental brief, at pages 2 and 3:

> "* * * The District Court, in the Tort Claims Act cases, found that Eastern *had* been cleared to land, and this Court ruled that such finding was 'amply justified' (Op. p. 33; [95 U. S. App. D. C. 189], 221 F. 2d 62, 79). Under the trial court's charge to the jury, Eastern could have been found liable only if it had *not* been cleared to land. Having found against Eastern the jury necessarily found that Eastern was not cleared to land, thus placing it in direct conflict with the fact finding of the Trial Judge. The result is an extraordinary and unusual situation in which, having heard the same evidence from the same witnesses, at the same time, and on the same record, the court (as a trier of the facts) and jury reach precisely contradictory conclusions. Based upon the court's fact finding, final judgments have been entered against the United States and duly affirmed by this Court and by the United States Supreme Court. The jury finding against Eastern is now before this Court for examination to determine if a new trial should be had.
>
> "It is a self-evident truth that the same proposition cannot be *true* and *false* at the same time, and under the same aspect. Therefore either the jury was wrong in finding that Eastern *was not* cleared to land, or the Trial Judge was wrong in finding that Eastern *was* cleared to land. The existence of this extraordinary and unseemly conflict of findings speaks most eloquently to the necessity for a new trial."

Before considering the new trial issue, we must decide whether the phase of it suggested in the foregoing quota-

tion remains open after remand, in view of the Supreme Court's decision that the District Court did not err in submitting the clearance question to the jury. We think it is still open. In submitting the clearance question to the jury, the trial judge simply held that, viewing the evidence in a light most favorable to the plaintiffs, an issue of fact had been raised, and in this he has been upheld by the Supreme Court; but he did not weigh or evaluate the evidence pro and con until he ruled on the motion for a new trial and this ruling has not been passed on by the Supreme Court.

A holding that a verdict for the defendant should not be directed does not necessarily mean that a verdict against him should not be set aside on a motion for a new trial. There is a clear distinction between a trial judge's duty in ruling on a motion for a directed verdict and his duty in ruling on a motion for a new trial. The distinction is reflected in Rule 50(b) and is shown in the cases. For example, in *Garrison* v. *United States*, 4 Cir., 1932, 62 F. 2d 41, Judge Parker said, at page 42:

> "• • • Where there is substantial evidence in support of plaintiff's case, the judge may not direct a verdict against him, even though he may not believe his evidence or may think that the weight of the evidence is on the other side; for, under the constitutional guaranty of trial by jury, it is for the jury to weigh the evidence and pass upon its credibility. He may, however, set aside a verdict supported by substantial evidence where in his opinion it is contrary to the clear weight of the evidence, or is based upon evidence which is false; for, even though the evidence be sufficient to preclude the direction of a verdict, it is still his duty to exercise his power over the proceedings before him to prevent a miscarriage of justice. • • •"

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In *Aetna Casualty & Surety Co.* v. *Yeatts*, 1941, 122 F. 2d 350, the Fourth Circuit again discussed the subject, and said at pages 352-53:

> "* * * On such a motion [for a new trial] it is the duty of the judge to set aside the verdict and grant a new trial, if he is of opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. The exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right. Smith v. Times Pub. Co., 178 Pa. 481, 36 A. 296, 35 L.R.A. 819; Bright v. Eynon 1 Burr. 390; Mellin v. Taylor 3 B.N.C. 109, 132 Eng. Reports 351. The matter was well put by Mr. Justice Mitchell, speaking for the Supreme Court of Pennsylvania in Smith v. Times Publishing Co., supra * * * as follows: 'The authority of the common pleas in the control and revision of excessive verdicts through the means of new trials was firmly settled in England before the foundation of this colony, and has always existed here without challenge under any of our constitutions. It is a power to examine the whole case on the law and the evidence, with a view to securing a result, not merely legal, but also not manifestly against justice,—a power exercised in pursuance of a sound judicial discretion, *without which the jury system would be a capricious and intolerable tyranny*, which no people could long endure. This court has had occasion more than once recently to say that it was *a power the courts ought to exercise unflinchingly*.' (Italics supplied)."

And at page 354, the court said:

> "To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require."

The foregoing paragraph was repeated in *Virginian Ry. Co.* v. *Armentrout*, 4 Cir., 1948, 166 F. 2d 400, 408, 4 A. L. R. 2d 1064, with this addition:

> "The power of this court to reverse the trial court for failure to exercise the power, where such failure, as here, amounts to an abuse of discretion, is likewise clear. * * *"

Other cases setting forth these principles include the following: *Montgomery Ward & Co.* v. *Duncan*, 1940, 311 U. S. 243, 251, 61 S. Ct. 189, 85 L. Ed. 147; *Mt. Adams & E. P. Inclined Ry. Co.* v. *Lowery*, 6 Cir., 1896, 74 Fed. 463; *Felton* v. *Spiro*, 6 Cir., 1897, 78 Fed. 576; *Adams* v. *United States*, 7 Cir., 1940, 116 F. 2d 199; *General American Life Ins. Co.* v. *Central Nat. Bank*, 6 Cir., 1943, 136 F. 2d 821; *Marsh* v. *Illinois Central R. R.*, 5 Cir., 1949, 175 F. 2d 498; *Southern Pac. Co.* v. *Guthrie*, 9 Cir., 1951, 186 F. 2d 926, 932 note 10; *Snead* v. *New York Central R. R.*, 4 Cir., 1954, 216 F. 2d 169.

We conclude, on the authorities and on reason as well, that the trial judge had the power and duty to grant a new trial if the verdicts were against the clear weight of the evidence, or if for any reason or combination of reasons justice would miscarry if they were allowed to stand; and that this court has the power and duty to

reverse and order a new trial if the trial judge abused his discretion in denying the motion therefor.

As to what has been said so far in this opinion, the court is unanimous. We are not in agreement, however, as to the disposition of the new trial issue. My brothers Edgerton and Fahy take the view that the verdicts were not so clearly against the weight of the evidence or so plainly the result of passion, prejudice and sympathy, or otherwise so unjust that the trial judge can be said to have abused his discretion in refusing to grant a new trial. It follows that this final point urged by Eastern is rejected by a majority of the court and the judgments against the appellant will be affirmed.

I think Eastern Air Lines is entitled to a new trial and that the trial judge abused the judicial discretion committed to him when he denied the motion. Although the discretion is broad and appellate review thereof is limited in scope, I suggest that the denial of a new trial must be held an abuse of discretion when it is demonstrable beyond peradventure that the verdict was flagrantly against the great weight of the evidence and that grave injustice will flow from it. Such is the situation here, in my opinion.

In the first place, a simple statement of what happened on the fatal morning is sufficient to arouse misgivings as to the validity of the jury's verdict. Shortly before noon on a clear, bright day, the Eastern airliner with two experienced pilots and 53 other persons aboard was swinging into final approach for landing. The Bolivian pilot, in a warplane so constructed that he could not see before and below him, was hurrying to land because of an ailing engine. He mistakenly thought, without asking the tower, that the plane authorized to land ahead of him on the runway he was approaching had already landed and was out of the way. So he came hurtling downward

and, without ever seeing the Eastern plane, struck it from above and behind, cut it in two, and killed the 55 persons who were aboard. Yet the jury said the Bolivian pilot was not negligent, and that the collision was caused by negligence on the part of the airliner's pilot.

There is no basis whatever for exonerating the Bolivian of negligence, as I shall show. The only substantial basis for attributing negligence to the stricken airliner is the charge that it had not been cleared to land and so had unauthorizedly deviated from the pattern when it swung into final approach, and had negligently placed itself in the path of danger. Undoubtedly the jury decided to conclude that the tower had not cleared the Eastern plane for landing,[2] so the weight of the evidence on that subject must be examined.

The tower operator unqualifiedly said he had given clearance to Eastern. He said the liner responded immediately to all his instructions from the time of its first appearance, including his direction to turn, unfortunately given too late, when he saw Bridoux was coming on regardless. The dead pilots are presumed to have done their duty. They were experienced men entrusted with the lives of a large number of people, and were of course imbued with the universal instinct of self-preservation. Moreover, the tower operator was confirmed by Bridoux himself, perhaps unwittingly, when he said the tower told him, "You are No. 2 to land on runway 3." The evidence shows no plane but Eastern which could have been No. 1 to land on that runway.

There was no affirmative evidence tending to show that landing clearance had not been given to the airliner.

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[2] The appellees urge, unconvincingly I think, that the jury may have thought Eastern was cleared to land and may have found it negligent for some other reason. The other negligence attributed to Eastern was too slight, and too much dependent upon lack of clearance, to give credence to the argument.

Lt. Shaw, the National pilot flying near Hains Point, merely said he heard none. His negative testimony is the only basis for the jury's conclusion. Shaw admitted, however, that he could not hear tower messages when his colleague depressed the transmitting key. He was engaged at the controls of a large airplane and did not remember all the tower communications which he did hear.

The jury's finding that Eastern had not been cleared to land, based on such flimsy evidence, when considered in connection with its astonishing verdict in favor of Bridoux, impresses me as having been the product of emotion rather than of evidence. I think the trial judge abused his discretion in not setting aside the verdicts as arbitrarily arrived at, contrary to the overwhelming weight of the evidence.

This brings me to a consideration of the jury's exoneration of Bridoux and the part it probably played in producing the verdicts against Eastern Air Lines. There may be some question as to whether the verdict in favor of the Bolivian pilot, who was of course a defendant in the jury trial along with Eastern, is before us for review, since there was no appeal from the judgment thereon. The propriety of the verdict was before the district judge, however, on the motion for a new trial; it was expressly drawn to his attention and he had the power *sua sponte* to grant a new trial of the cases against Bridoux. *Sulzbacher* v. *Continental Casualty Co.*, 8 Cir., 1937, 88 F. 2d 122. Regardless of that, the fact that the jury found for Bridoux is pertinent for consideration; for, if the verdict in his favor was contrary to the weight of the evidence and was dictated by sympathy, as I think it clearly was, the jury's willingness to depart from the evidence and to be swayed by emotion is demonstrated.

The source of the jury's sympathy for Bridoux is easily seen in his testimony. His story was a moving one, even in cold print. It must have been even more dramatic and appealing when he told from the witness stand in faulty English how he had never seen the Eastern craft, how he plunged into the Potomac, and how he escaped from his plane as it lay on the bottom of the river, although he was grievously injured.

But the fact is that, to all intents and purposes, he admitted guilt of the grossest sort of negligence, except for which the collision would not have occurred. He was flying over the busy National Airport a plane which probably should not have been permitted to ascend into such crowded air because its structural design limited visibility and because it had a defective engine which developed trouble when he had been aloft only a few minutes. He was in a hurry to land.

In this situation, when the tower said in response to his request for landing instructions, "You are No. 2 to land on runway 3," Bridoux said he regarded the statement as actual and absolute landing clearance as soon as he should decide for himself, without further communication from or with the tower, that the No. 1 plane to land on runway 3 was out of the way. Not only did he testify that he so regarded the tower statement when it was made to him, but he also argumentatively insisted from the witness stand that he had correctly interpreted the tower message.

This misinterpretation, due either to stupidity or unfamiliarity with the English language, was the primary cause of the collision, for Bridoux acted in accordance with his misunderstanding. He said he saw a plane on the ground ahead of him which he concluded was the No. 1 plane already landed, and so he thought it unnecessary to check with the tower to learn whether the plane

cleared to land before him had actually landed. Instead he proceeded to descend blindly at the rate of 500 feet per minute and at a forward speed of 150 miles per hour. As a consequence he struck the Eastern plane, which he never saw and which was vainly trying to escape from him in response to frantic warning given by the tower operator when he saw Bridoux was not turning to the left as he had been told to do. Bridoux said he heard this instruction but thought it was directed to a plane on the ground. The fact that the Bolivian pilot's mistaken idea that he had been authorized to land without further clearance was the primary cause of the collision is also reflected in these questions to Bridoux and his answers to them:

> "Q. It would have prevented this accident, wouldn't it, if you had called the tower and inquired as to the identity of the plane abhead of you? A. Except that I happened to observe this plane on final approach, not any other plane. Therefore I assumed this was the No. 1. This was the only one on final approach.
>
> "Q. And that is where the trouble came in, because you assumed that was the plane that was ahead of you, isn't it, Captain? A. Probably, sir."

In view of the foregoing, it is unthinkable that the jury had any reason except sympathy for finding that the probably judgment-proof Bridoux was not negligent. It was an easy step for such an impressionable jury, through sympathy for the more than 50 dead and their bereaved dependents, to find against the luckless appellant, whose witnesses were killed in the crash.

Other factors, insufficient standing alone to require reversal, may have contributed to the totality of unfairness. For example, the appellees' attempt to show "that the tower statements and testimony did in fact result from

mutual consultations between the tower men and their superiors"[3] may have been regarded by the jury as a charge of fabrication and concoction and therefore as an attack on the veracity and integrity of the tower operators. To be sure, the appellees disclaimed any intention of charging them with corruption, and the court consequently admonished the jury to put out of their minds the idea there was any charge of concocted or fabricated testimony by the tower witnesses. But a jury willing to depart from the evidence so far as to find a verdict for the Bolivian pilot might well have been willing to ignore the court's admonition, and to seize upon the idea of fabrication as a reason for rejecting the tower testimony.

We have seen that it is the duty of a trial judge to grant a new trial when it is clearly necessary to do so in order to prevent a miscarriage of justice. He ought to perform the duty by exercising the power "unflinchingly," as the Pennsylvania court said. It is equally our duty to see that a miscarriage of justice does not result from a jury's verdict. From the same evidence which the jury heard, the trial judge found the tower operators had negligently cleared both Eastern and Bolivian to land on the same runway at approximately the same time, and awarded judgment against the Government principally because of that negligence. Thus he did not agree with the jury on the fundamental issue as to whether Eastern was negligent, but found that its plane had been cleared to land. His finding has in effect been affirmed by the Supreme Court, and I think is conclusively correct. Certainly it was amply justified by the evidence. Had the jury reached the same sound conclusion, it would have been bound to absolve Eastern.

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[3] Appellee's brief on remand, p. 3.

Opinion on Remand of Court of Appeals for the District of Columbia, Dated September 20, 1956

This court's affirmance of the judgments against the appellant produces this anomalous situation: Eastern Air Lines and the United States have both been mulcted in damages because of contrary findings on a single fundamental factual issue. The judgments against both defendants cannot possibly be correct; justice has miscarried either as to Eastern or as to the Government. Since the Supreme Court has affirmed the judgments against the latter,[4] and so has stamped approval on the finding that the Eastern plane was cleared to land, I see no escape from the conclusion that Eastern Air Lines is the victim of injustice.

I would resolve the anomaly by reversing the judgments and remanding the cases for a new trial with directions that, if the evidence on the subject is substantially the same as before, the landing clearance question should not be submitted to the jury, since the question has now, as it had not when the first jury was instructed, been authoritatively answered; other acts of negligence alleged against Eastern, if supported sufficiently by evidence, should be submitted for the jury's consideration. I am unwilling to believe the court is powerless to right the wrong which has been done in these cases.

Affirmed.

[4] *United States* v. *Union Trust Co.*, 1955, 350 U. S. 907, 76 S. Ct. 192.

Opinion of United States District Court for the District of Columbia, Dated May 5, 1953

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civ. Nos. 4691–50, 4692–50

UNION TRUST CO. OF DISTRICT OF COLUMBIA et al.,
Plaintiffs,

v.

UNITED STATES,
Defendants.

(Two cases)

Galiher & Stewart, Washington, D. C., and Bigham, Englar, Jones & Houston, New York City, for defendant Eastern Air Lines, Inc.

David G. Bress and Sheldon Bernstein, Washington, D. C., for Union Trust Co.

Ross O'Donoghue and Vincent Burke, Jr., Asst. U S. Attys., Washington, D. C., for U. S.

McGUIRE, District Judge.

These are wrongful death actions by the executor of the estates of Ralph E. Miller and Mildred Miller, husband and wife, who died in an air collision of November 1, 1949, in the vicinity of Washington National Airport while they were passengers in an Eastern Airlines plane.

Before trial the parties had stipulated and agreed on the following facts:

At approximately 11:46-11:47 A. M., E. S. T. on November 1, 1949, an Eastern Airlines DC-4 No. N88727, de-

nominated as Eastern flight 537, and a P-38 military type aircraft No. NX-26927 collided in mid-air while the Eastern DC-4 plane was approximately 300 feet in the air on final approach for landing on runway number 3 at the Washington National Airport, Washington, D. C. Eastern flight 537 was carrying a crew of 4 persons (pilot, copilot, steward and stewardess) and 51 passengers, all of whom, including plaintiffs' decedents, were killed in and as a direct and proximate result of said accident. The P-38 was carrying only the pilot, Eric Rios Bridoux, a citizen of Bolivia and an officer in the Bolivan Air Force who was then operating the P-38. Bridoux was seriously injured in said collision but survived. Both aircraft were completely wrecked and such debris or components of the planes as were thereafter found in or near the scene of the collision are indicated on a stipulated chart.

Eastern's flight 537 was enroute from Boston, Massachusetts, via intermediate points to Washington, D. C. Over Beltsville, Maryland, 15 miles northeast of the Washington National Airport, flight 537 contacted the Washington control tower on 119.1 megacycles voice radio communications and the flight was cleared by the tower to enter a left traffic pattern for landing on runway number 3. One minute before that clearance, that is, at 11:37 A. M., E. S. T., the P-38 had taken off from runway number 3 at Washington National Airport on a test flight. From the time the P-38 departed until after the accident, visibility in the vicinity of the airport remained at 15 miles, ceiling was 6,500 feet with scattered clouds at 3,500 and surface wind was from the northeast 20-25 miles per hour.

As to the defendant Eastern Airlines, there was a jury verdict against it, while the defendant Bridoux was exonerated.

The case of the defendant United States was tried to

the Court at the same time, the plaintiff alleging negligence of a concurring character specifically set forth in a pretrial stipulation:

a. The failure of the control tower personnel to issue a timely warning to the Eastern plane as to the P-38 being on final approach;

b. The failure of the tower personnel to take appropriate steps to warn the P-38 that the Eastern plane was on final approach and to deter him from flight actions inconsistent with or dangerous thereto;

c. The failure of the tower personnel to take appropriate action to separate the two planes involved so as to avoid collision;

d. The failure of the tower personnel to employ simultaneous radio transmissions to both planes to assure each being advised as to the actions of and the directions to the other;

e. The failure of the tower personnel to require the Eastern plane to follow the prescribed landing pattern and toleration of a shortcut thereof;

f. The failure of the tower to warn the P-38 that the Eastern plane was not following the prescribed landing pattern but was shortcutting same;

g. Violation of air regulations then and there in full force and effect, as follows: Civil Air Regulations, Part 26, § 26.26, Aeronautical Rules for the Washington National Airport, § 571.3.

I conclude under the statute, the Federal Tort Claims Act, 28 U. S. C. A. §§ 1346, 2671 *et seq.*, so-called relied upon by the plaintiff in its suit against the Government, that the United States has waived immunity, and the Court has jurisdiction.

Opinion of United States District Court for the District of Columbia, Dated May 5, 1953

The case of *Feres, Executrix* v. *United States*, 340 U. S. 135, 71 S. Ct. 153, 95 L. Ed. 152, relied on heavily by the Government in support of its motion for a directed judgment in its favor, can be distinguished.

True, Mr. Justice Jackson, who spoke for the Court and interpreting the statute said: " * * * It will be seen that this is not the creation of new causes of action but acceptance of liability under circumstances that would bring *private* [emphasis supplied] liability into existence." 340 U. S. at page 141, 71 S. Ct. at page 157.

And it is on this language that the Government seizes with avidity. It contends that since the United States, through the Civil Aeronautics Board and the Administrator of Civil Aeronautics, in discharge of a congressional mandate, has promulgated exhaustive and complete air traffic rules governing all phases of air traffic operation and control, which have nationwide force and application —that this is a function sovereign in character and constitutional in genesis:

> "Congress has recognized the natural responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. *It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders.* [Emphasis supplied] Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state gov-

ernment." Northwest Air Lines v. State of Minnesota, 1944, 322 U. S. 292, 303, 64 S. Ct. 950, 956, 88 L. Ed. 1283.

With the duty thus imposed of the "regulation of air commerce in such manner as to best promote its development and safety * * *", Title 49 U. S. C. A. § 402(e), there follows as a matter of course the corollary responsibility to promote safety of flight, by the prescription of air traffic rules, and their revision from time to time as circumstances and conditions warrant and dictate, "* * * for the prevention of collisions between aircraft, and between aircraft and land or water vehicles." 49 U. S. C. A. § 551(a) (7).

Thus the Government concludes since this function is purely governmental—that is, sovereign—there is no liability since the only allowable claims are those which "* * * in the same manner and to the same extent a private individual under like circumstances * * *" would be liable for, with certain exceptions not material here, and since there is no liability of a private individual "even remotely analogous to that * * *" now asserted against the Unted States, the claim falls.

For it is argued no private individual has power to assume the prerogatives of sovereignty, for no private person, individual or corporate could possibly act in the capacity in which the United States acts in its regulation of air commerce, citing Feres, supra.

But the Feres case as has been said can be distinguished for it went off on the matter of status. And the distinction is one of substance. Feres was a soldier who perished in a barracks fire while on active duty; the negligence alleged being the quartering him in barracks which were known or should have been known to have been un-

safe because of a defective heating plant—the Court concluding:

> "We know of no American law which ever has permitted a *soldier to recover for negligence, against either his superior officers or the Government he is serving.* [Italics supplied.] Nor is there any liability 'under like circumstances,' for no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command." 340 U. S. supra, at page 141, 71 S. Ct. at page 157.

It is upon this language which the Government strongly relies, but in support of the distinction made, it is suggested that the concluding paragraph of the opinion, 340 U. S. supra, at page 146, 71 S. Ct. 153, clearly and conclusively shows that the Government's argument is actually what it purports to be—analogous only, and remotely so. That paragraph as is germane reads as follows:

> "We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. * * * We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for *service-connected* injuries or death due to negligence." (Emphasis supplied.) 340 U. S. supra, at page 146, 71 S. Ct. at page 159.

Thus it appears emphasizing the distinction made.

In this connection it is interesting to note the case of *United States* v. *Spelar,* 338 U. S. 217, 70 S. Ct. 10, 94 L. Ed. 3, decided in October Term 1949 and just about eleven months before the decision in Feres. There, the

Opinion of United States District Court for the District of Columbia, Dated May 5, 1953

District Court of the United States for the Eastern District of New York dismissed an action brought against the United States under the Act to recover for the wrongful death of a flight engineer at an airfield in Newfoundland leased by the United States from Great Britain, alleging, it appears, negligence upon the part of the United States in the operation of the field. *Spelar* v. *U. S.*, D. C., 75 F. Supp. 967. The Court of Appeals, 2 Cir., reversed, 171 F. 2d 208.

The decedent Spelar was an employee of American Overseas Airlines and was killed in a take-off crash. The plane involved was that of the decedent. The District Court as has been said dismissed the action,—not, however, on the ground of governmental immunity but predicated its action on the fact of the incident occurring in a "foreign country" and thus within a specific exception set forth in the statute.[1] The Supreme Court reversed the Court of Appeals, holding with the Court of first instance.

Now this is of interest solely as an indication that apparently the government in the *Spelar* case was not quite so certain of the point it argues here with such urgency, and it must have had some doubt about it, because it preferred to take its position on the more certain ground of a statutory exception. Nor was an appeal taken in *Cerri* v. *United States*, 80 F. Supp. 831 at page 833, in which Judge Roche met the issue head on and decided it adversely to the government, and in an opinion that has since been liberally quoted and relied on.

Certainly if the regulation of air commerce is a sovereign function that of the Coast Guard is sovereign also, being as it is "a military service and a branch of the armed forces of the United States at all times • • •",

[1] 28 U. S. C. § 2680(k).

Title 14, U. S. C. A. § 1, and an essential part of its function is aids to navigation. 14 U. S. C. A. § 81.

And further, part of its function in this respect is to maintain Loran stations "(b) required to serve the needs of the maritime commerce of the United States; or (c) *required to serve the needs of the air commerce of the United States as determined by the Administrator of Civil Aeronautics.*" (Italics supplied.) Id.; cf. also 14 U. S. C. A. § 82.

Yet it has been held that a case was stated against the United States under the Federal Tort Claims Act, the negligence alleged being that of creating and marking the wreck of an old battleship. The Court, citing and adopting the distinction herein made of the reach and effect of the *Feres* case, supra.

Somerset Seafood Co. v. *United States*, 4 Cir., 1951, 193 F. 2d 631, 633, 634, 635, citing *Cerri* v. *U. S.*, supra, with approval.

The conclusions thus reached, it seems to me, are indicative of the fact that the technical niceties hitherto drawn between what are governmental and other functions are rapidly being done away with in an age in which the activities of the Government impinge so manifoldly upon the individual citizen in nearly all of his. The present climate of public opinion, of which the Federal Tort Claims Act is the most conspicuous example, is to the effect that the fiction of sovereign immunity is for the most part outmoded and as far as it relates to the act in question, preserved only in those specific exceptions which Congress has specifically indicated and of which the activity with which we are here concerned is not one. See generally, *Federal Crop Ins. Co.* v. *Merrill*, 1947, 332 U. S. 380, 383, 68 S. Ct. 1, 92 L. Ed. 10.

As the Supreme Court has further said, in *United States* v. *Yellow Cab Co.*, 1950, 340 U. S. 543, at page 547, 548,

49 and 550, 71 S. Ct. 399, 402, 95 L. Ed. 523, in relation o the Federal Tort Claims Act:

"The Federal Tort Claims Act waives the Government's immunity from suit in sweeping language. It unquestionably waives it in favor of an injured person. • • •

"This Act does not subject the Government to a previously unrecognized type of obligation. Through hundreds of private relief acts, each Congress for many years has recognized the Government's obligation to pay claims on account of damage to or loss of property or on account of personal injury or death caused by negligent or wrongful acts of employees of the Government. This Act merely substitutes the District Courts for Congress as the agency to determine the validity and amount of the claims. It suggests no reason for reading into it fine distinctions between various types of such claims. • • •

"• • • The proceedings emphasized the benefits to be derived from relieving Congress of the pressure of private claims. Recognizing such a clearly defined breadth of purpose for the bill as a whole, and the general trend toward increasing the scope of the waiver by the United States of its sovereign immunity from suit, it is inconsistent to whittle it down by refinements."

New York State has had a similar statute for some years. See: *Jackson* v. *State of New York*, 1933, 261 N. Y. 134, 184 N. E. 735; *Bloom* v. *Jewish Board of Guardians*, 1941, 286 N. Y. 349, 36 N. E. 2d 617; *Foley* v. *State of New York*, 1945, 294 N. Y. 275, 62 N. E. 2d 69, citing *Jackson* v. *State of New York* and *Bloom* v. *Jewish Board of Guardians, supra*. *Moch Co.* v. *Rensselaer Water Co.*,

247 N. Y. 160, 159 N. E. 896, 62 A. L. R. 1199 can be distinguished.

All of which leads to this: When the Government, as here, takes upon itself the function—as it claims it must—of the regulation of air commerce and the responsibility, among other things, of regulating the flow of traffic at a public airport, the assumption of such a responsibility involves something further, namely, not only an activity designed to be protective of the interest of that a morphous group known as the public as a whole, but that of individuals as well, against potential hazards incident to such performance and implicit in its undertaking. And if injury or death results as a consequence of the negligence of its servants or agents so engaged, Congress has decreed that the mantle of sovereignty which heretofore has protected it, falls from its shoulders and thus what was formerly at best an unenforceable moral obligation is thus transmuted into an actionable legal right. And whatever exceptions there are, this is not one of them.

Such I find to be the situation here and so hold.

So much for liability. As to negligence, I find that there was failure of the control tower personnel to issue a timely warning to the Eastern plane as to the P-38 being on final approach; in the failure, also, to warn the P-38 that Eastern was on final approach; in clearing both planes for the same runway at approximately the same time, having in mind their respective positions in relation to each other and the speed of both their approach and descent, and the failure to keep both planes advised as to the activities of the other; I find this to be negligence and concurrent both in character and in relation to that found by the jury with respect to the defendant Eastern. I find, further, that such negligence contributed proximately to the injury complained of.

Opinion of United States District Court for the District of Columbia, Dated May 5, 1953

With respect to the locale, the Court concurs in the finding of the jury that the accident occurred in the District of Columbia. This particular question was not easy of resolution. The presentation of evidence with respect to it took many trial days and it was a very long trial. But a careful evaluation of it, having in mind such pertinent and persuasive factors as the narrowness, so to speak, of the geographical area involved in relation to the line of demarcation between the District of Columbia and the Commonwealth of Virginia; the allowing for the widening angle of vision from the position of an observer on the ground in relation to an object in the air unless directly overhead; and the grave possibility of error resulting therefrom; the very suddenness of the business, so to speak; the nature and character of the terrain, etc., all lead to this conclusion. In addition, by way of corollary and in support of this finding, the testimony of an expert, skilled in the science of aerodynamics and predicated basically on admitted facts as to where the major wreckage of the carrrier was found, and his mathematical reconstruction as a consequence of the episode, allowing as he did for such factors as speed, wind velocity, weight, altitude, position, direction; the type of aircraft involved; the character of the collision, and result to the passenger plane and *where*, in relation to its fuselage; the aerodynamic characteristics involved from the time its tail fell off; the horizontal advance of the forward section; the character and nature of falling bodies generally and those specifically involved here; conclusively resolves the question as far as the Court is concerned, indicating as it did in relation to all of the evidence that it preponderated decisively in favor of the factual resolution reached.

With reference to damages, I also concur in the verdict of the jury and find accordingly, i. e., $50,000 for

the estate of the male decedent and $15,000 for that of the female. Nor do I in the present state of the economic worth of the dollar and the evidence adduced herein conclude in either case such sums to be in any way excessive. Counsel will prepare tentative findings of fact and judgment. Order accordingly.

Statutes

ADMINISTRATIVE PROCEDURE ACT—5 U. S. C. 1001 et seq.

Sec. 1001. Definitions.

As used in this chapter——

• • •

(c) Rule and rule making.

"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy * * *. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

• • •

(g) Agency proceeding and action.

"Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act. (June 11, 1946, ch. 324, sec. 2, 60 Stat. 237)

Sec. 1002. Publication of information, rules, opinions orders and public records.

(a) Every agency shall separately state and currently publish in the Federal Register * * * (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

Sec. 1003. Rule making.

Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts——

(a) Notice; publication and contents.

General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued)

that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) Procedures.

After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection.

(c) Time of publication or service of rules.

The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

FEDERAL REGISTER ACT—44 U. S. C. 301 et seq.

Sec. 301. Custody and printing of Federal documents; "Division" created in Archives Establishment; Director, appointment and compensation.

The Administrator of General Services, acting through a division established by him in the National Archives Establishment, hereinafter referred to as the "Division", is charged with the custody and, together with the Public

Printer, with the prompt and uniform printing and distribution of the documents required or authorized to be published under section 305 of this title.

Sec. 302. Filing documents with "Division"; notation of time; public inspection; transmission for printing.

The original and two duplicate originals or certified copies of any document required or authorized to be published under section 305 of this title shall be filed with the Division, which shall be open for that purpose during all hours of the working days when the Archives Building shall be open for official business. The Administrator of General Services shall cause to be noted on the original and duplicate originals or certified copies of each document the day and hour of filing thereof: *Provided*, That when the original is issued, prescribed, or promulgated outside of the District of Columbia and certified copies are filed before the filing of the original, the notation shall be of the day and hour of filing of the certified copies. Upon such filing, at least one copy shall be immediately available for public inspection in the office of the Administrator of General Services. The original shall be retained in the archives of the National Archives Establishment and shall be available for inspection under regulations to be prescribed by the Administrator of General Services. The Division shall transmit immediately to the Government Printing Office for printing, as provided in this chapter, one duplicate original or certified copy of each document required or authorized to be published under section 305 of this title. Every Federal agency shall cause to be transmitted for filing as herein required the original and the duplicate originals or certified copies of all such documents issued, prescribed, or promulgated by the agency. (July 26, 1935, ch. 417, sec.

2, 49 Stat. 500; June 30, 1949, ch. 288 title I, sec. 104 (a), 63 Stat. 381.)

Sec. 303. "Federal Register"; printing; contents; distribution; price.

All documents required or authorized to be published under section 305 of this title shall be printed and distributed forthwith by the Government Printing Office in a serial publication designated the "Federal Register."

Sec. 304. Definitions.

As used in this chapter, unless the context otherwise requires, the term "document" means any Presidential proclamation or Executive order and any order, regulation, rule, certificate, code of fair competition, license, notice, or similar instrument issued, prescribed, or promulgated by a Federal agency; the terms "Federal agency" or "agency" mean the President of the United States, or any executive department, independent board, establishment, bureau, agency, institution, commission, or separate office of the administrative branch of the Government of the United States but not the legislative or judicial branches of the Government; and the term "person" means any individual, partnership, association, or corporation. (July 26, 1935, ch. 417, sec. 4, 49 Stat. 501.)

Sec. 305. Documents to be published in Federal Register; comments and news items excluded.

(a) There shall be published in the Federal Register • • • (2) such documents or classes of documents as the President shall determine from time to time have general applicability and legal effect; and (3) such documents or classes of documents as may be required so to be published by Act of the Congress: *Provided,* That for the purposes of this chapter every document or order which

shall prescribe a penalty shall be deemed to have general applicability and legal effect.

(b) In addition to the foregoing there shall also be published in the Federal Register such other documents or classes of documents as may be authorized to be published pursuant hereto by regulations prescribed hereunder with the approval of the President, but in no case shall comments or news items of any character whatsoever be authorized to be published in the Federal Register. (July 26, 1935, ch. 417, sec. 5, 49 Stat. 501.)

Sec. 307. Filing document as constructive notice; publication in Register as presumption of validity; judicial notice; citation.

No document required under section 305 (a) of this title to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof until the duplicate originals or certified copies of the document shall have been filed with the Division and a copy made available for public inspection as provided in section 302 of this title; and, unless otherwise specifically provided by statute, such filing of any document, required or authorized to be published under section 305 of this title, shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby. The publication in the Federal Register of any document shall create a rebuttable presumption (a) that it was duly issued, prescribed, or promulgated; (b) that it was duly filed with the Division and made available for public inspection at the day and hour stated in the printed notation; (c) that the copy contained in the Federal Register is a true copy of the original; and, (d) that all requirements of this chapter and the regulations prescribed hereunder relative to such

document have been complied with. The contents of the Federal Register shall be judicially noticed and, without prejudice to any other mode of citation, may be cited by volume and page number. (July 26, 1935, ch. 417, sec. 7, 49 Stat. 502.)

Sec. 308. Publication in Register as notice of hearing.

Whenever notice of hearing or of opportunity to be heard is required or authorized to be given by or under an Act of the Congress, or may otherwise properly be given, the notice shall be deemed to have been duly given to all persons residing within the continental United States (not including Alaska), except in cases where notice by publication is insufficient in law, if said notice shall be published in the Federal Register at such time that the period between the publication and the date fixed in such notice for the hearing or for the termination of the opportunity to be heard shall be (a) not less than the time specifically prescribed for the publication of the notice by the appropriate Act of the Congress; or (b) not less than fifteen days when no time for publication is specifically prescribed by the Act, without prejudice, however, to the effectiveness of any notice of less than fifteen days where such shorter period is reasonable. (July 26, 1935, ch. 417, sec. 8, 49 Stat. 502.)

UNITED STATES STATUTES AT LARGE, VOL. 59, Part 1, Chapter 443, Public Law 208, October 31, 1945

"Sec. 101. The boundary line between the District of Columbia and the Commonwealth of Virginia is hereby established as follows:

Said boundary line shall begin at a point where the northwest boundary of the District of Columbia intercepts

the high-water mark on the Virginia shore of the Potomac River and following the present mean high-water mark; thence in a southeasterly direction along the Virginia shore of the Potomac River to Little River, along the Virginia shore of Little River to Boundary Channel, along the Virginia side of Boundary Channel to the main body of the Potomac River, along the Virginia side of the Potomac River across the mouths of all tributaries affected by the tides of the river to Second Street, Alexandria, Virginia, from Second Street to the present established pierhead line, and following said pierhead line to its connection with the District of Columbia-Maryland boundary line; that whenever said mean high-water mark on the Virginia shore is altered by artificial fills and excavations made by the United States, or by alluvion or erosion, then the boundary shall follow the new mean high-water mark on the Virginia shore as altered, or whenever the location of the pierhead line along the Alexandria water front is altered, then the boundary shall follow the new location of the pierhead line.

Sec. 102. All that part of the territory situated on the Virginia side of the Potomac River lying between the boundary line as described in section 101 and the mean high-water mark as it existed January 24, 1791, is hereby ceded to and declared to be henceforth within the territorial boundaries, jurisdiction, and the sovereignty of the State of Virginia: Provided, however, That concurrent jurisdiction over the said area is hereby reserved to the United States."

Statutes

District of Columbia Code—Washington National Airport (Chapter 13)

Sec. 7-1301. Administration of airport—Definitions.

(a) "Administrator" means the Administrator of the Civil Aeronautics Authority.

(b) "Airport" means the Washington National Airport, which shall consist of, and include, the tract of land, together with all structures, improvements, and other facilities located thereon, lying partly in the District of Columbia, and partly in the state of Virginia, * * *.

Sec. 7-1302. Powers and duties of Administrator—Rules and regulations.

The Administrator shall have control over, and responsibility for, the care, operation, maintenance, and protection of the airport, together with the power to make and amend such rules and regulations as he may deem necessary to the proper exercise thereof. (June 29, 1940, 54 Stat. 687, ch. 444, sec. 2.)

Sec. 7-1305. Penalty for violations.

Any person who knowingly and willfully violates any rule or regulation prescribed under this chapter shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than $500 or imprisoned not more than six months, or both. (June 29, 1940, ch. 444, sec. 5, as added May 15, 1947, 61 Stat. 94, ch. 62.)

Statutes

Air Traffic Rules—14 CFR, Part 60
(as of Nov. 1, 1949)

§60.1. Scope. The air traffic rules in this part shall apply to aircraft operated anywhere in the United States, including the several States, the District of Columbia, and the several Territories and possessions of the United States, including the territorial waters and the overlying airspace thereof, except:

(a) Military aircraft of the United States armed forces when appropriate military authority determines that non-compliance with this part is required and prior notice thereof is given to the Administrator, and

(b) Aircraft engaged in special flight operations, requiring deviation from this part, which are conducted in accordance with the terms and conditions of a certificate of waiver issued by the Administrator.

Note: Specific operations which cannot be conducted within the provisions of the regulations in this part, such as air races, air meets, acrobatic flights, or certain pest control or seeding operations require, prior to commencement of the operation, a certificate of waiver which may be obtained from the nearest office of CAA.

§60.14. Right-of-way. An aircraft which is obliged by the following rules to keep out of the way of another shall avoid passing over or under the other, or crossing ahead of it, unless passing well clear;

Note. Right-of-way rules do not apply when, for reasons beyond the pilot's control, aircraft cannot be seen due to restrictions of visibility. The aircraft which has the right-of-way will normally maintain its course and

speed, but nothing in this part relieves the pilot from the responsibility for taking such action as will best aid to avert collision.

§60.18. Operation on and in the vicinity of an airport.

Aircraft shall be operated on and in the vicinity of an airport in accordance with the following rules:

• • •

(b) If air traffic control is in operation at the airport, contact shall be maintained with such control, either visually or by radio, to receive any air traffic control instructions which may be issued;

(c) Aircraft operating from an airport shall conform to the traffic patterns prescribed for that airport;

(d) The Administrator may, when necessary in the interest of safety, prescribe traffic patterns for an airport which shall supersede any other traffic patterns previously prescribed;

§60.19. Air traffic control instructions.

No person shall operate an aircraft contrary to air traffic control instructions in areas where air traffic control is exercised.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 841

EASTERN AIRLINES, INC., *Petitioner,*

v.

UNION TRUST COMPANY, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR UNION TRUST COMPANY, ET AL. IN OPPOSITION

INTRODUCTION

On November 1, 1949, fifty-five families were bereaved by a tragic mid-air crash on the approaches to the Washington National Airport which, on March 13, 1953, a jury found to have been negligently caused by petitioner, Eastern Air Lines, Inc. The sufficiency of the evidence of Eastern's negligence was impressively sustained by this Court's order of December 5, 1955, granting certiorari in No. 298, O. T. 1955 (*Union Trust Company, et al.* v. *Eastern Air Lines, Inc.*) and reversing the judgment of the Court of Appeals.

Yet almost seven and one-half years after their tragic loss, after bereaved minors have already become adults, the families of the decedents are still awaiting relief which cannot come until final termination of this seemingly interminable litigation — litigation again being extended by a petition for a writ of certiorari which by a combination of sophistry, legerdemain and distortion of the record attempts to manufacture issues for certiorari consideration.

I.

EASTERN'S FIRST REASON FOR GRANTING THE WRIT— THE ALLEGED ADMINISTRATIVE PROCEDURE ACT ISSUE—WAS NOT AN ISSUE BY REASON OF THE MANNER IN WHICH THE CASE WAS SUBMITTED TO THE JURY; IT HAS ALREADY BEEN FINALLY DISPOSED OF HERE AND BELOW; AND IN ANY EVENT IS WHOLLY WITHOUT MERIT

A. THE ADMISSIBILITY OR VIOLATION OF THE TRAFFIC PATTERN IS WHOLLY ACADEMIC IN THE CONTEXT OF THE CASE AS SUBMITTED TO THE JURY

The traffic pattern for Washington National Airport was admitted in evidence at a point in plaintiffs' case in chief when plaintiffs sought to prove, *inter alia,* that when the Eastern plane "shortcut" the established pattern for landing (i.e., started its landing from west or southwest of the airport rather than continuing around south of Alexandria and then north to the airport) that shortcut was in and of itself an act of negligence. The defense then offered evidence in its case which tended to show that if Eastern received a clearance to land it had a right then and there to leave the pattern, regardless of its then position, and proceed to land from that point without completing the entire course of the pattern. Eastern never contended that there was no pattern nor that there was

any pattern different from the one received in evidence. It simply contended that it was in the pattern and had the right to depart therefrom when it received clearance to land. The trial judge then adopted Eastern's contention and stated that he would charge the jury that, if it found Eastern was cleared to land, then it was authorized to leave the pattern at that point and Eastern could not be held liable by reason of anything connected with the pattern (X J.A. 2090). In this connection, the trial court charged the jury as follows:

> "This is the prescribed pattern. But you are instructed as a matter of law that there is nothing rigid about it . . . It . . . must be followed but not with the rigidity and the inflexibility of a line from one point to another. Indeed, the very purpose of flight traffic patterns is to control traffic . . . but at a controlled airport, such as Washington, the controller has the final say; and you are so instructed.
>
> "However, the unauthorized stepping out of the pattern, leaving the pattern, departing from it—and note my language—the unauthorized stepping out of the pattern, leaving the pattern, departing from it, would be a violation of law, because the pattern is prescribed by rule which has the force and effect of law. And so, therefore, unauthorized action of the character I have just referred to would be negligence . . ." (X J.A. 2108-2109).
>
> * * *
>
> "And therefore, by virtue of the fact of his [the air traffic control officer's] control of operations in and around the zone in question, and the airport in particular, he may authorize, upon request or without such request, a departure or a leaving or a stepping out from the so-called traffic pattern. It is asserted by the defendant Eastern Air Lines

> that they were given such authority, in the form of an instruction 'cleared to land', and if you find that to be a fact upon all of the evidence in this case, then the plaintiff's allegation of negligence in this respect falls, because authority to leave the pattern—or to depart from the pattern, if you will—was granted, and the Eastern airliner would be in the place where it was permitted to be at the time in question. If you should find there was an authorized departure, either by request or order, your finding would be for the defendant Eastern, because the allegation of negligence in this respect, as I have said, would not have been established." (X J.A. 2111-2112).

The entirety of the charge on the pattern and clearance point is set out as Appendix A hereto (pp. 1a-5a).

In order to present an ostensible issue for consideration on petition for a writ of certiorari, Eastern has now distorted the issue submitted to the jury. Eastern's first reason for granting the writ (questions presented 1 and 2) is bottomed upon the assumption that the jury was permitted to decide that Eastern's negligence lay in not following the detailed prescriptions of the traffic pattern. But the charge quoted above makes it self-evident that the only issue submitted to the jury (with respect to pattern or clearance—as distinguished from lookout[1]) was whether Eastern had been cleared to land.

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[1] Eastern also implies that the clearance issue was the only one in the case. For example, Eastern asserts (Pet. 9), that because the trial court instructed the jury that a plane cleared to land is entitled to assume no other aircraft is a hazard "the other minor and trifling allegations of fault, such as lookout, right of way, etc., were *expressly* removed from jury consideration if the DC-4 had been cleared to land" (Emphasis supplied; see also Pet. 30). Only desperation could father such bald distortion. Early in

Under the charge, if the jury found Eastern had been cleared to land, then *ipso facto* its subsequent actions could not—said the court—be considered any violation or negligence (See also IV J. A. 860, 861). On the other hand, if the jury found that Eastern was not cleared, its *unauthorized* departure from the pattern—that is, attempting to land without clearance—became the act of negligence. In either event, the detailed specifications and requirements of the traffic pattern itself were not a permissible predicate for decision. In short (apart from the lookout and other

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his charge, the trial judge listed the several acts of negligence claimed against Eastern and enumerated as the first "The failure to maintain a proper lookout and to take appropriate steps to avoid collision, when its pilot or its pilots saw or should have seen . . . the imminence of collision" (X J.A. 2107; note also third act of negligence there enumerated). Thereafter, the trial court gave further detailed instructions as to the jury's evaluation of these other acts of negligence upon which its verdict might be based apart from the clearance issue (X J.A. 2107-8, 2109, 2110-11, 2112, 2113).

Aside from the pertinent violation of miscellaneous air regulations referred to in the trial court's charge, from the record it was unquestionable that the Eastern pilots could and should have seen the P-38 at all times while they were on their so-called downwind (headed south) leg of the pattern and while they were turning into their final turn to land. During this several minute period until the very last seconds before the crash, the Eastern pilots should have realized the P-38 was a hazard, or vice versa, and should have taken action to avoid it. Indeed the supporting evidence was so strong that in its candid brief on the facts in the court below, the Government stated (p. 9) "There is no testimony to show that Eastern's pilots took any action to avoid the collision until the last moment although from the description of the paths of flight it seems clear that the P-38 could have been seen by the DC-4 pilots."

That there was substantial evidence of negligence apart from the clearance issue is also apparent from the Court of Appeals original judgment remanding for a new trial on the issue of liability but extracting from that new trial any issue with respect to clearance.

issues), the verdict was required to turn upon whether or not Eastern was cleared to land without regard to the specifications of *the* traffic pattern or *any* traffic pattern. Therefore, whether or not the pattern was admissible or a valid and binding federal regulation played no part whatsoever in the verdict and cannot now, therefore, be any basis upon which to attack that verdict.

In these circumstances, petitioner's first "reason" for granting the writ raises an academic issue insofar as this case is concerned and is, as the trial judge himself stated (IV J.A. 860; see also 861) "much ado about nothing." Accordingly, the supposed irreconcilable conflict between Courts of Appeals postured as the first reason for granting the writ is a concocted effort to have this Court decide a question not in issue on the record.

B. EVEN ASSUMING THE TRAFFIC PATTERN ISSUE IS NOT ACADEMIC IN THIS CASE, IT HAS ALREADY BEEN FINALLY ADJUDICATED HERE AND BELOW

When this case was first before this Court on respondent's petition for certiorari, the Court of Appeals had entered judgment in Eastern's favor reversing the trial court and remanding the case for a new trial. In opposing respondent's petition, Eastern had the right, without filing a cross-petition, to raise any ground which, although rejected by the Court of Appeals, would support that court's determination. *Jaffke* v. *Dunham,* 1 L. Ed. 2d 314 (1957); *United States* v. *Carignan,* 342 U. S. 36 (1951); *Helvering* v. *Lerner Stores Corp. (Md.),* 314 U. S. 463 (1941); *Langnes* v. *Green,* 282 U. S. 531 (1931). Since the admission of the traffic pattern, if error as claimed by Eastern, would have supported the earlier judgment of

the Court of Appeals in reversing the trial court's judgment and remanding, and since the Court of Appeals had, in its first opinion, rejected Eastern's argument and sustained the admissibility of the pattern (App. to Pet. 13a), that point was plainly available to Eastern when these cases were first before this Court in No. 298, O. T. 1955. By not having raised the traffic pattern issue in its opposition to certiorari as an alternative basis for affirmance, Eastern waived that issue. *Urie* v. *Thompson,* 337 U. S. 163, 196 (1949); *United States Trust Co.* v. *New Mexico,* 183 U. S. 536 (1901).

This Court's order of December 5, 1955, reversing the judgment of the Court of Appeals, caused Eastern to sense that its own failure to seasonably raise the traffic pattern issue had cut-off review thereof by this Court.[2] By its Petition for Rehearing in No. 298, O.T. 1955, addressed to this Court's order of December 5, Eastern's silence was broken, and a hue and cry was raised on the traffic pattern issue—tacitly urged as an alternative ground for affirmance. That argument was captioned (Point V, p. 48): "The *per curiam* order should be vacated for the further reason that the Court of Appeals erroneously decided, and this Court did not review, a major issue of law under the Federal Administrative Procedure Act; and because its decision in this regard is in conflict with a decision of the Court of Appeals for the Ninth Circuit." Bottomed on the traffic pattern issue was Eastern's alternative plea in its rehearing petition (p. 50) that

[2] ". . . if the *per curiam* of December 5th was not intended to reverse the judgment of the Court of Appeals as to the validity of the purported regulation, then [Eastern] has been deprived of the opportunity to seek review in this Court . . ." Eastern's Petition For Rehearing in No. 298, O. T. 1955, at 49.

"so much of the order as reversed the judgment below should be vacated, and the case should be placed on the calendar of this Court for briefs and oral argument on the merits of *all* issues" (emphasis supplied)—including the traffic pattern issue.

But this Court, by its order of February 27, 1956, refused to grant such relief. Instead, it left intact its reversal of December 5, 1955 with only the modification that "the case be remanded to the Court of Appeals to permit that court to pass upon the several issues left undecided by [this Court's] reversal of its judgment." And whether or not this Court's refusal to grant such relief to Eastern amounted to an approval of the Court of Appeal's disposition of the traffic pattern issue—which we think it did (compare *United States* v. *Esnault-Pelterie,* 303 U. S. 26 (1938))—the modification of this Court's previous order was in all respects consistent with, and in response to, the final alternative prayer for relief in Eastern's Petition for Rehearing. That prayer (p. 50) sought further consideration below only in respect to "undecided issues"; *it did not request remand on the traffic pattern issue.*[3] Accordingly, at Eastern's own request the traffic pattern issue was then effectively eliminated from the case, and it may not now be heard to urge the contrary.

Upon remand, the Court of Appeals, on May 22, 1956, denied an Eastern motion which sought leave to bring the traffic pattern issue into the remand pro-

[3] The final prayer for relief (p. 50) was as follows. "As a further alternative, the order of December 5, 1955, should be modified so as to remand the cause to the United States Court of Appeals for the District of Columbia to permit that Court to pass upon the several issues left undecided."

ceeding, indicating that court's view that the traffic pattern issue was not open on remand. Since Eastern's present petition seeks review of the remand determination of the Court of Appeals, only those remand matters—which Eastern itself delimited—should be presented to this Court. *Illinois ex rel. Hunt* v. *Illinois C. R. Co.*, 184 U. S. 77 (1902); *Cf., Insurance Group Committee* v. *Denver & R. G. R. R. Co.*, 327 U. S. 607 (1947).

C. IN ANY EVENT, THERE IS NO MERIT TO THE CONTENTION THAT THE TRAFFIC PATTERN WAS INADMISSIBLE

At the outset, we take exception to Eastern's cavalier assertion (Pet. 8) that it was a "conceded fact" that the traffic pattern was not adopted in conformity with the Administrative Procedure Act. Not only was this not conceded, but respondents vigorously contended the contrary in *both* courts below and in both courts filed briefs contrary to petitioner's position. See the petitioner's own record reference, IV J.A. 843-865.

1. There Was Sufficient Compliance With Statute in the Manner of Publication

Conceding that prior to November 1, 1949, the revised rules of the Washington National Airport were published in the Federal Register, including that rule (14 C.F.R. 570.55) requiring landing aircraft to comply with the pattern for Washington National (Pet. 16-17), Eastern argues that the publication was insufficient to comply with the Administrative Procedure Act because of the failure to set out in the Federal Register the detailed drawing of the pattern itself rather than relying upon the reference in the regulation published in the Federal Register to Airman's Guide, wherein the pattern was duly published.

The statutory purpose of requiring publication in the Federal Register is merely one of giving constructive notice. In contrast, publication in the Airman's Guide, a specialized publication of the United States Department of Commerce universally used by all airmen and airlines, would offer far greater assurance of widespread dissemination of the matter than by publication in the Federal Register itself. The form of publication in the Federal Register that was employed (see 14 C.F.R. 570.55 quoted in Pet., at p. 7) certainly gave notice to all airmen that patterns had been prescribed for Washington National Airport, that they were required to follow those patterns and that by reference to Airman's Guide, they should inform themselves of the details of the patterns. Thus the form of publication employed was the most utilitarian.

Even assuming that the details of the pattern were required to be published, the reference to Airman's Guide in the rule published in the Federal Register was, in effect, an incorporation by reference which is a well recognized legislative procedure. See, *e.g.*, *Interstate Consolidated Street Ry. Co.* v. *Mass.*, 207 U. S. 79, 84, 85 (1907). Utilization of such a reference procedure for details of the pattern was contemplated in the legislative history of the Administrative Procedure Act wherein implicit approval was given to similar existing practices by administrative agencies.[4]

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[4] "Where it is not desirable to publish complicated forms at length and in full spread fashion in the Federal Register, under this provision [Sec. 3(a)(3) Admin. Proc. Act] an agency may publish in the Federal Register a simple statement of the contents of the form and, if plans are available, state where they may be obtained." H. Rept. 1980, 79th Congress, 2d Session, on S. 7 at p. 22. Obviously, this thought embraced the details of maps and

It is by reason of this incorporation by reference in the instant case that *Hotch* v. *United States,* 208 F. 2d 244, *reh.,* 208 F. 2d 249, *second reh.,* 212 F. 2d 280 (C.A. 9, 1953-4)—relied upon by Eastern below, in its petition for rehearing in No. 298, O.T. 1955 and in its current petition—is readily distinguishable. In *Hotch,* the regulations that were published in the Federal Register (see 208 F. 2d at 245) did not, expressly or inferentially, incorporate by reference those later promulgated regulations not published in the Register for violation of which Hotch was criminally prosecuted. Nor did the published regulations inform those affected where the later unpublished regulations might be found.

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charts which could better be published and given more widespread dissemination in such publications as Airman's Guide.

See also S. Doc. 10, 77th Congress, 1st Session (one of a series of monographs of the Attorney General's committee on Administrative Procedure) where, in referring to regulations of the War Department in aid of navigation and establishment of anchorages and harbor lines, the report states (p. 19) "Regulations when made are published in full in the Federal Register and are usually displayed at public places in the affected area and harbor lines and anchorages, as approved by the Secretary, are simply shown on maps, copies of which are furnished the district and division officers for the reference of those who may be concerned." In the Attorney General's Committee's final report, (submitted to the Vice President on January 24, 1941) detailed recommendations for the improvement of administrative procedures were embodied and the foregoing administrative procedures of the War Department analyzed (p. 155) but without any criticism of the failure to publish harbor and anchorage maps in *haec verba* in the Federal Register. Significantly the committee report comments on the good use of agency periodicals as a device for disseminating information, specific mention being made of the Airman's Guide. (Note 7, p. 29). The comment was made that "since all of these publications are specialized and relatively inexpensive, they are superior for this purpose to the Federal Register."

In contrast here, all those affected by § 570.55 of the published air regulation (i.e., all users of Washington National Airport) were expressly informed by the regulation to look to Airman's Guide for the specifics of the pattern. Thus, the vital distinction between the regulatory patterns here and in *Hotch* is the difference between one reasonably calculated to give notice to the affected persons and one not so designed, whether or not actual notice is received in a case arising under the latter. *Cf., Wuchter* v. *Pizzutti*, 276 U. S. 13 (1928).

In these circumstances, so different than *Hotch*, to urge that the Federal Register must physically contain all minutae is to dogmatize beyond the bounds of reason. To argue that the C.A.A. flouted the law by incorporating the Airman's Guide—which all carriers possess—instead of physically including the pattern in the Federal Register—which few, if any, carriers possess—is plain cavil. To insist that Congress did not contemplate the agencies might have legitimate and *reasonable* recourse to the practice of incorporation by reference—a device well known and frequently used by Congress—is an absurdity. To urge such technical refinements to a pattern known and accepted by all using the airport is inconsonant with a petition allegedly seeking to right a "flagrant miscarriage of justice" (Pet. 29).

2. Any Question as to the Propriety of the Manner of Publication Was Cured by Eastern's Actual Notice

All other arguments aside, however, Eastern's admitted actual notice of the pattern renders moot questions as to technical compliance with publication procedures. Sec. 7 of the Federal Register Act (44

U.S.C. 307) in pertinent part provides that no document required to be published in the Federal Register which is not so published "shall be valid as against any person who has not had actual notice thereof". That actual knowledge, in lieu of the constructive notice given by publication in the Federal Register, is effective to make a regulation enforceable against persons having such actual knowledge is abundantly clear from the legislative history of both the Federal Register Act and the Administrative Procedure Act.[5] See also *Borak* v. *Biddle,* 78 U. S. App. D. C. 374, 376 (1944).

The single purpose of Federal Register publication, like various recording statutes for liens, mortgages, etc., is merely to give notice. Accordingly, the absence of recordation or the failure to follow the mechanics of the statutes can be relied upon only by those persons who do not have *actual* knowledge of the prior claim or lien. Eastern's argument that this is

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[5] In a compilation of the legislative history of the Administrative Procedure Act, prepared by the Department of Justice and reprinted as S. Doc. No. 248, 79th Congress, 2nd Session at p. 415 (see also appendix of Congressional Record, May 25, 1946, Vol. 92, Part XIV, p. A2987), the following appears:

> "The last sentence of Sec. (a) states: 'No person shall in any manner be required to resort to organization or procedure not so published.' But this does not mean that a person who has actual notice is not required to resort to agency organization or procedure if it has actual notice of a rule, he is bound by it. The only purpose of the requirement for publication in the Federal Register is to make sure that persons may find the necessary rules as to organization and procedure if they seek them. It goes without saying that actual notice is the best of all notices. At most, the Federal Register gives constructive notice."

See also 79 Cong. Record 4786 re actual notice under Federal Register Act.

absurd because it would mean that plaintiffs' Exhibit 7 was a binding regulation for some pilots landing at the airport, but not for others presupposes that pilots are lawyers. Even assuming, *arguendo,* that a colorable legal argument could be made as to some technical deficiencies in the manner in which the landing pattern was published, to pilots the landing pattern was *de facto* binding, which, even in Eastern's case, is evident from testimony of an Eastern official that Eastern maintained a multiple subscription to Airman's Guide and that the published pattern for Washington National Airport was widely disseminated amongst its pilot personnel.[6]

II.

EASTERN'S SECOND REASON FOR GRANTING THE WRIT IS ESSENTIALLY AN ATTACK UPON THIS COURT'S EARLIER REVERSAL, AND, IN ANY EVENT, PRESENTS NO REVIEWABLE QUESTION

Eastern's second "reason" for granting the writ is a conglomerate of many contentions, some previously disposed of by this Court, some plainly not reviewable and some obviously not raising questions of certiorari stature even if, *arguendo,* reflecting error below.

At the outset, Eastern's Supplemental Brief on Remand filed below after this Court reversed and remanded to permit the Court of Appeals to pass upon "the several issues left undecided by [this Court's] reversal of its judgment", argued only two points: First, that there was an "anomaly" in the conflict between the trial judge's finding (in the independent test cases involving the United States), that Eastern

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[6] The pertinent testimony of that official, George H. Roerig, Assistant to the Vice President in Operations, is set out as Appendix B (pp. 5a-9a) to this brief.

had been cleared to land, and the alleged implicit jury finding that it had not; and second, that Eastern was deprived of a fair trial by reason of respondent's design to destroy the integrity and credibility of the tower witnesses by baseless charges of fabrication and concoction. The emphasis in Eastern's Supplemental Brief on Remand was on the latter point.[7]

It is highly significant that the so-called anomaly argument was *never* previously raised in any court, here or below, prior to its invention in Eastern's Supplemental Brief on Remand. Although the last paragraph of page 11 of the present petition seeks to

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[7] The Supplemental Brief on Remand, incorporated by reference Eastern's earlier claims with respect to the propriety of the consolidated trial (Pet. 32-33), the alleged grotesqueness of the verdict as to Bridoux (Pet. 33-35) and the alleged error of the jury's finding as to the situs of the collision (Pet. 35-36).

But these contentions are, of course, specious. While respondents were of the view that there was substantial evidence of Bridoux' negligence, nevertheless there was undisputed evidence of the limitations of vision from the P-38 cockpit and powerful circumstantial evidence to support Bridoux' testimony as to his own clearance to land. The jury, therefore, had the right to accept his version of the affair and there is no legal basis to impugn its verdict in this regard. Moreover, insofar as sympathy is concerned, the entire background of newspaper comment upon, and public inquiry into the crash was hostile to Bridoux and, if anything, was calculated to favor Eastern.

With respect to the consolidated trial, Eastern is in no position to complain since it fully consented thereto. Finally, Eastern's "concluding reference" (Pet. 35) to the situs determination ignores the fact that the trial judge made a parallel finding which was fully supported by overwhelmingly convincing expert testimony showing that the crash had to occur over water and that the objects found on land were undoubtedly dispersed by the combined forces of wind, impact and the centrifugal effects of the P-38 propeller (IV J.A. 764 to V J.A. 972). In any event, for the same reasons expressed in I B, *supra*, this matter could and should have been raised by Eastern in connection with the proceedings in No. 298, O.T. 1955.

imply that this issue was raised or at least considered on Eastern's motion for new trial, the fact is it never was and this is plainly shown by Eastern's statement of the grounds of that motion particularized on page 7 of its Petition for Rehearing in No. 298, O.T. 1955.[8]

This last minute argument was rejected by the majority below on remand, in an opinion written by the dissenter, Judge Miller (App. to Pet. 40a-54a). Now, gaining a measure of comfort from that dissent and that dissent's expression of what the majority of the panel decided, Eastern says that they "concluded unanimously that the jury verdict . . . *was* contrary to the evidence, *was* the result of passion, prejudice and sympathy and *was* productive of injustice" (Pet. 29). This is pure sophistry possible only through the anomalous practice below of having a dissenting judge publish the majority view.

But Eastern does not stop after so distorting the majority holding below. It goes on to state: (1) that, under the trial court's charge to the jury, Eastern was to be exculpated if the jury found it had been cleared to land; and (2) that a finding of such clearance removed from jury consideration any other claimed acts of negligence and, in effect, permitted Eastern to proceed blindfolded, relying on the assurances of the clearance (Pet. 30). Again, this is sheer distortion, for, as more fully shown in footnote 1, *supra,* there was substantial evidence to support the other claimed acts of negligence and they were clearly and unmistakenly submitted to the jury as bases for a plaintiffs' verdict.

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[8] As a matter of fact, page 2 of Eastern's Supplemental Brief on Remand, expressly labels the anomaly or inconsistency contention as an "additional argument" to those previously made.

Garbed in whatever language Eastern or Judge Miller might contrive, however, the dissent below and Eastern's present petition are actually a refusal to recognize (or a belated plea to reverse) this Court's orders in No. 298, O. T. 1955 reversing the earlier judgment of the Court of Appeals which had held that there was insufficient evidence to go to the jury on the clearance issue. This is evident in both Eastern's and Judge Miller's extravagant pleas of injustice and miscarriage and rather oblique descriptions of what they believe the evidence showed or the trial court charged without once considering or discussing those matters presented, necessarily considered by, and decided in No. 298, O. T. 1955.

That the so-called anomaly contention initiated by Eastern after remand, adopted by Judge Miller and now reiterated in the petition is essentially a refusal to accept the mandate in No. 298, O. T. 1955 is further buttressed by Judge Miller's concluding assertion (App. to Pet. at 54a) that "he would resolve the anomaly by reversing the judgment and remanding the cases for a new trial with directions that, if the evidence on the subject is substantially the same as before, the landing clearance question should not be submitted to the jury . . ." That proposal apparently both Eastern and Judge Miller conceive to be proper notwithstanding this Court's reversal of the prior Court of Appeals decision holding to the same effect.

Moreover, Judge Miller and Eastern find anomaly where none exists by *assuming* that the jury did actually find that Eastern was not cleared to land. While the jury could have so found, it is equally plausible that the jury found Eastern was cleared, but that it was negligent in pursuing its authorization

under the circumstances where the P-38 was clearly visible and constituted a hazard to (or vice versa) the DC-4 (see fn. 1, *supra*). Clearance to land does not give an absolute right to land regardless of then existing conditions. It merely authorizes the pilot to leave the traffic pattern and land if such can be safely done (X J.A. 2030). This is no different than the right of a motorist to proceed on a green light which cannot be exercised blindly or without regard to a clear and present danger. With the substantial evidence of Eastern's negligence in failing to maintain a proper lookout, submitted to the jury under proper instructions (see fn. 1, *supra*), it is illusory to argue, as Eastern has and the dissent below now seems to be convinced, that "undoubtedly the jury decided to conclude that the tower had not cleared the Eastern plane for landing . . ." (App. to Pet. at 49a). Particularly significant of the strain necessary to indulge in the anomaly argument is the contrasting statement by Judge Miller in the *original* opinion below that "We do not know in what way its [the jury's] members considered Eastern has been negligent . . ." (App. to Pet. at 20a).

Even were we to assume, *arguendo,* that in fact the jury found Eastern had not been cleared, it still does not follow that the trial judge was required, in the exercise of his discretion, to set aside that finding because of his contrary finding that Eastern had been cleared. If he were so *required,* then Eastern's argument is tantamount to a contention that the trial judge should have directed a verdict on the clearance question which is, in effect, what the Court of Appeals held in its earlier judgment reversed by this Court in No. 298, O. T. 1955. Moreover, were the judge

required to direct (or set aside) a verdict because of his conflicting finding (as an independent fact finder in an independent case), this would deny respondents their constitutional right of trial by jury in the case against Eastern. And it was this very thesis—and this thesis alone—upon which the petition for a writ of certiorari was based in No. 298, O. T. 1955.

Finally, the dissent below and Eastern misconceive the power to review the trial court's determination as to the sufficiency of the evidence. For present purposes, we may concede a distinction between (1) there being substantial evidence sufficient to go to the jury and (2) the vulnerability of a verdict based on that evidence because of its being against the weight of the evidence—although that would appear in most cases, as here, to be a distinction without a difference. A trial judge's ruling on the first matter is subject to appellate correction. But appellate courts cannot review the denial of a motion for new trial based on a reappraisal of the weight of the evidentiary basis for the verdict. *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 247-248 (1940).

The authorities cited in the opinion below demonstrate that the dissent confuses appellate review of rulings on motion for new trial which involve *questions of law* (i.e., excessive damages, failure of trial court to exercise discretion by weighing the evidence) with those which involve *questions of fact* which have been reviewed by the trial judge. The latter may not be attempted even under a standard which would reverse only for an abuse of discretion. Yet notwithstanding its assumed posture, this is precisely what Eastern's petition would have this Court do. Shy away as it does, from literal reliance on Judge Miller's

dissenting view that he would reverse for what he describes as the trial court's abuse of discretion in denying the motion for new trial "when it is demonstrable beyond peradventure of doubt that the verdict was flagrantly against the great weight of the evidence" (App. to Pet. 48a), Eastern nevertheless must base its second "reason" for granting the writ on that same theory. For none of the anguish poured out in the petition is in and of itself grounds for appellate review (particularly on certiorari) unless it is claimed to be a basis for reversible error—and, as noted, even were it error, it is not reviewable where, as here, it merely goes to questions of fact addressed to the trial court's exercise of discretion.

In short, ignoring this Court's earlier determination that the Court of Appeals reversal because of alleged insufficiency of evidence for jury consideration cannot stand, Eastern now again seeks to review a denial of a motion for new trial on the ground that the trial court abused its discretion in its evaluation of the weight of the evidence, even though a majority of the panel below found there was no such clear abuse and the entire bench below refused the matter reconsideration.

CONCLUSION

The petition presents no question of certiorari stature let alone any question of merit. In essence it seeks further review of questions previously disposed of here and below. The petition should, therefore, be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

(Extract from Trial Court's Charge to Jury)

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With reference to the pattern at the Washington National Airport, this pattern in a general sense provided that an aircraft arriving from the north and desiring to land at the Washington National Airport on Runway 3 would proceed from north to west, in the general vicinity of the Pentagon, and then proceed from that direction south, on what is called, in aeronautical terminology, in the language of those in the business, on its downwind leg, and continue in that southerly direction south in the direction of the George Washington Memorial Temple and south of the city of Alexandria, then turning due east on what is called the base leg, and ultimately what is called the final approach, a north or northeast heading.

There is no need for me to go over that. You have heard it as often as I have heard it. This is the prescribed pattern. But you are instructed as a matter of law that there is nothing rigid about it. It must
4500 be conformed to in a general way. In other words, the pattern is not a line drawn over the ground

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which must be followed by the airplane in question. It is just exactly as the word itself indicates, a pattern which must be followed, but not with the rigidity and the inflexibility of a line from one point to another. Indeed, the very purpose of flight traffic patterns is to control traffic, and at an uncontrolled airport it must be followed; but at a controlled airport, such as Washington, the controller has the final say; and you are so instructed.

However, the unauthorized stepping out of the pattern, leaving the pattern, departing from it—and note my lan-

guage — the unauthorized stepping out of the pattern, leaving the pattern, departing from it, would be a violation of law, because the pattern is prescribed by rule which has the force and effect of law. And so, therefore, unauthorized action of the character I have just referred to would be negligence, as I have defined that term to you, and would be, as we lawyers say, negligence *per se,* in other words, would be negligence as a result of the very act itself and no further proof would be necessary. This is the negligence, in this aspect of the case, which the plaintiff alleges against Eastern. So if, therefore, you should conclude upon all of the evidence in this case as far as the defendant Eastern is concerned that the
4501 plaintiff has established negligence, as I have defined that term to you, with reference to any of the three allegations of negligence which it has brought forward—or if there are four and I have omitted one, we will come to it later—and has done this by the preponderance of the evidence, that would not be enough. Another important, necessary step must be taken. And that step is that the negligence thus established, if you find it to be established, with reference to any of the acts alleged or all of them, or with respect to only one of them, must also be proven by the preponderance of the evidence to have been the proximate cause, as I have defined that term to you, of the wrong complained of here. That done, then your finding would be for the plaintiff, and

then you would proceed as the next step in your deliberations to assess the damages in terms of money by the application of the law with respect to the measure of damages, concerning which I shall instruct you later.

But, on the other hand, if you should conclude that the plaintiff has failed to establish negligence by the preponderance of the evidence with respect to the defend-

ant Eastern, then your inquiry ceases there and your verdict under such circumstances must be for the defendant, and you are so instructed.

Again, if you should find as I have indicated, that negligence has been established, but such negligence
4502 standing alone or in relation to that of the other defendant, if established, was not the proximate cause of the resultant wrong complained of, then your verdict under such circumstances would be for the defendant Eastern Air Lines.

You are instructed further that if you find that Eastern, in compliance with an instruction or an authorization of the tower, was unknown to itself placed in a position of danger, of which the pilot or pilots of Eastern could not possibly under the circumstances be made aware, and the collision resulted therefrom, then your verdict must be in favor of the defendant Eastern Air Lines.

Or if the United States Government, acting through its agents, the men who occupy the control tower and who are required to maintain a continuous watch on all visual flight operations in the control zone, failed to give the plane of the defendant Eastern Air Lines or of the defendant Bridoux proper landing instructions or clearance, and said failure was the proximate cause or the only cause of the accident, as I have defined that term to you, then your verdict would be in favor of both of the defendants, namely, both Bridoux and Eastern, and you are so instructed.

You are further instructed that whether the DC-4 while on downwind leg or while on its continuous turn

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from base leg to final approach, if you find that to be the fact, saw or should have seen the P-38, that did not re-

quire the DC-4 to change its course, unless the DC-4 knew or should have known that the P-38 constituted a collision hazard.

You are further instructed that in consideration of the conditions at the Washington National Airport on November 1, 1949, if you find the Eastern DC-4 was cleared to land on Runway 3, north or west of the tower, and was authorized to thereafter commence its landing approach to Runway 3 at such time and place as it desired, then it was not necessary for said plane to lengthen its downwind leg south of Alexandria before turning into base leg. And further, if you so find, you are instructed as a matter of law that the Eastern plane, as a consequence of that authorization, could break the pattern at any place in the pattern that the communication was received. Further, once a plane is cleared to land, it is entitled to assume that no other plane has been cleared to land on the same runway at the same time, and that all other craft in the control zone have been properly separated by the tower and do not constitute a collision hazard to it.

This airport, as we have seen, is under what is called "air traffic control." That means that no person shall operate an aircraft contrary to air traffic control instructions, where such control is exercised; and so, therefore, for the purposes of this case, prior to entering the control area or control zone, air traffic clearance must be obtained from the control officer. As a consequence, therefore, the air control officer is in control, as the words themselves indicate. And therefore, by virtue of the fact of his control of operations in and around the zone in question, and the airport in particular, he may authorize, upon request or without such request, a departure or a leaving or a stepping out from the so-called traffic pattern. It is asserted by the defendant Eastern Air Lines that they were given such authority,

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in the form of an instruction "Cleared to land," and if you find that to be a fact upon all of the evidence in this case, then the plaintiff's allegation of negligence in this respect falls, because authority to leave the pattern—or to depart from the pattern, if you will—was granted, and the Eastern airliner would be in the place where it was permitted to be at the time in question. If you should find there was an authorized departure, either by request or order, your finding would be for the defendant Eastern, because the allegation of negligence in this respect, as I have said, would not have been established.

Of course, if you find that there was no failure on Eastern's part to maintain a proper lookout or to take appropriate steps to avoid the collision, commensurate with its duty as a common carrier, and if you find that the operators of the Eastern plane neither could have seen the imminence of the collision, nor in any way
4505 derogated from the standard of care to which they were held in this respect, then the allegation of negligence with respect to that also falls by the board and your finding would be, as a consequence, for the defendant Eastern, and you are so instructed.

APPENDIX B

(Extracts from Testimony of George H. Roerig Not Printed in Joint Appendix)

• • •

591 Q. What is your position with Eastern Air Lines?

A. Assistant to the Vice President in Operations.

Q. How long have you been with Eastern Air Lines?

A. A little over 22 years.

Q. And were you with Eastern Air Lines at the time the Civil Aeronautics Act was adopted?

A. Yes.

592 Q. And were you with the Eastern Air Lines when the Airmen's Guide began its publication?

A. I don't recall when it began publication.

Q. During the past 10 years, that is, from 1943, say 1943 to 1950, during that period, how many copies of the Airmen's Guide did Eastern Air Lines get each month?—each two weeks?

A. I don't know.

Q. Well, can you tell us approximately how many copies?

A. Well, it would be impossible for me to tell you how many we get each year.

Q. No; it is published twice a month, every two weeks, by the Department of Commerce. Did you get 200 copies, or 100 copies, or 500 copies?

A. Oh, we would probably get a hundred copies. Let me see, what period of time was that?

Q. I would say from 1943 to 1950, that is, including the period.

A. That answer wouldn't be right for part of that period.

Q. What part—

A. It varies—a minimum of, I would say, 25 to 30, and maybe up to 75.

Q. Were you with the company during that entire
593 period?

A. Yes.

Q. Upon receipt of the Airmen's Guide, of that number of copies, is information in that Guide relating to the traffic patterns for airports put in the company manual used by pilots?

Mr. Aherne. I will have to object to the question as leading, Your Honor.

The Court. Are you calling him under the rule?

Mr. Bress. As an adverse witness, yes.

Mr. Aherne. I withdraw the objection.

The Court. All right.

By Mr. Bress:

Q. You state it would be put into the company manual?

A. Yes.

Q. Would you tell the Judge what the company manual is, that contains the traffic patterns for airports, and what else is in it, and whether or not each pilot has to have his company manual and has to pass an examination on that manual?

Mr. Aherne. I think counsel might separate that question. I think probably there are three questions in one, Mr. Bress.

Mr. Bress. All right, sir.

The Witness. I would like to have it read back to me before I answer it.

594 By Mr. Bress:

Q. All right, I will break it down. In addition to traffic patterns, what else is in the company manual?

Mr. Aherne. Has the witness testified that traffic patterns were in the company manual, Mr. Bress?

Mr. Bress. Yes, sir.

By Mr. Bress:

Q. What else is in the manual?

A. I would say that the approach procedures for airports.

* * *

595 Q. Let us get back to the company manuals. Is the
596 maintenance of a company manual required by law?

A. Yes.

Q. Is a pilot required to have a copy of the company manual?

A. Yes.

Q. Is a pilot required, under Eastern procedures, to pass any oral or written test with respect to familiarity and knowledge of the contents of that company manual?

A. That part of the manual that has to do with the routes over which he is operating, not the entire manual.

Q. That which has to do with the routes over which he is operating?

A. Yes.

Q. As part of the examination on the routes over which he is to operate, does that examination cover also the landing and takeoff patterns for airports that he is to call at and take off from on that route?

A. I don't know.

Q. You don't know about that. But the law requires each pilot to have a manual; or is it the rule of the company that requires it?—if you know it.

The Court. He says the law.

Mr. Bress. The law requires the maintenance of the manual. Very well.

By Mr. Bress:

597 Q. As part of the route information pilots are to fly, that covers your ILS data for that route?

A. Yes.

Q. What else is pertinent to information for a pilot flying that route, say, New York to Washington? What else is in that route information?

A. At the time we also had the radio facility charts as published by the Coast and Geodetic Survey.

Q. That is in the manual?

A. Yes.

Q. All right. That is published by Coast and Geodetic. And by the charts, you mean a chart similar to Plaintiff's Exhibit No. 4? Is that the kind of chart you are talking about?

A. No. It is an aeronautics chart, but it is not that type.

Q. Does it show the traffic lanes and that kind of information?

A. It shows the airways.

Q. All right, sir. In addition to the ILS procedure, the radio facilities, and the chart you refer to, what other information concerning route information is contained in the manual?

A. Position reporting point.

598 Q. What else?

A. Minimum en route altitude for airways.

Q. Very well. What about the changes that occur in landing patterns? Are they included?

A. Yes.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 841

EASTERN AIR LINES, INC.,
Petitioner,

v.

UNION TRUST COMPANY, *et al.*,
Respondents.

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 841

EASTERN AIR LINES, INC.,

Petitioner,

v.

UNION TRUST COMPANY, *et al.*,

Respondents.

To the Honorable Earl Warren, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Eastern Air Lines, Inc. begs leave to make the following reply to respondents' brief in opposition.

The statement in the two introductory paragraphs of the opposition brief that fifty-five bereaved families "are still awaiting relief" must be the result of oversight. The two respondents, parties to this record, now have final judgments, each for $15,000, in their separate suits against the United States. Although more than a year has passed no attempt has ever been made to enforce those judgments. By stipulation those final judgments are controlling upon the United States in the some fifty other suits arising out of this disaster. So far as petitioner has been able to learn no steps have ever been taken to liquidate or enforce this adjudicated liability of the United States in any case. If the bereaved families "are still awaiting relief" it must be because someone has failed to make available to them relief which they already are entitled to.

* * * *

Counsel for petitioner feel it unnecessary to do more than deny the baseless charges of "sophistry" "legerdemain" "distortion" and "concoction" which the opposition brief repeatedly makes. The record will speak for itself; and when the record is read, we rather believe it will show that the shoe is on the other foot.

* * * *

It is, indeed, strange the respondent should now assert (Brief pp. 2-6) that the admissibility of Exhibit "7" is academic. A position so transparently untenable is tantamount to a confession of error on the point it seeks to by-pass.

It was respondent's contention from the beginning, and this jury was charged, *not* that an unauthorized departure from the traffic pattern could be *some evidence of negligence,* but that, in and of itself, such departure was negligence *per se*—negligence as a matter of law. The charge was:

> "* * * the unauthorized stepping out of the pattern, * * * would be a violation of law, *because the pattern is prescribed by rule which has the force and effect of law.* And so, therefore, unauthorized action of the character I have just referred to would be negligence, * * * *negligence per se, in other words, would be negligence as a result of the very act itself and no further proof would be necessary.*" (X JA 2109; opposition appendix p. 2a; our italics).

That, precisely, was respondents' contention[1] and the Dis-

[1] See the pre-trial order which charged Eastern with "deviating from the prescribed landing pattern and procedures" (I JA 21-22). See counsel's opening to the jury "First they (Eastern) *have violated the law* with respect to the prescribed landing pattern" (I JA 63). Respondents' closing summation to the jury is not in the record, but it is fair to infer that it fully exploited the pre-trial order, the opening statement, and Exhibit 7.

trict Judge informed the jury that it was. He told them immediately following the above instruction:

> "This is the negligence, in this aspect of the case which plaintiff alleges against Eastern". (X JA 2109).

In the face of this record the brief in opposition asserts (P. 6) that the admissibility of the traffic pattern, and its character as a federal regulation was "academic" and "played no part" in the verdict. If there be "distortion" "legerdemain" or "concoction", we submit this as a sample. It will be remembered that the Court of Appeals *twice* considered and passed upon the admissibility of Ex. 7. 221 F. 2d 62; 239 F. 2d 25; App. pp. 10a-13a, 42a-43a. It was the very *essence* of respondents' case against Eastern. They cannot now disclaim it.

* * * *

Respondents' next contention is also a prayer to by-pass the traffic pattern point. The argument, indeed, is one of desperation. At no time, either intentionally or accidentally, did Eastern waive the point. None of the cases cited is authority for the proposition that it did.

When this case first came to this Court in No. 298 at the October Term 1955, a district court judgment in favor of respondents had been reversed by the Court of Appeals with direction for a new trial. That judgment of the Court of Appeals was *interlocutory*. The admissibility of Exhibit "7" had been decided adversely to Eastern in a judgment of the Court of Appeals which also directed a new trial. Eastern's right to raise the point existed only in respect of a final judgment terminating the litigation, not in respect of a judgment which remanded the case for a new trial, (*Urie* v. *Thompson*, 337 U. S. 163, 171-173) and opened the record for such new and different evidence as the parties might see fit to adduce—all of which could again come before the Court of Appeals on

a new record; and possibly also before this Court. Eastern was not an *aggrieved* party. The judgment against it had been reversed and the correctness of the traffic pattern ruling in that posture of the case was "not appropriate for adjudication" at the instance of the then respondent. *Rice* v. *Sioux City Cemetery*, 349 U. S. 70; *Layne & Bowler Corp.* v. *Western Well Works*, 261 U. S. 387, 393.

All this was pointed out in Eastern's petition for a rehearing of the *per curiam* decision of December 5, 1955 in No. 298 October Term 1955 (350 U. S. 907). That petition urged as a "further" reason for a rehearing and remand to the Court of Appeals that "the Court of Appeals erroneously decided and this Court did not review a major issue of law under the Federal Administrative Procedure Act" (p. 48). The flat reversal of the Court of Appeals judgment effected by the *per curiam* of Dec. 5, 1955 (350 U. S. 907), it was pointed out, would have the effect of *depriving* the "then respondent (petitioner) of opportunity to seek review in this court of a major federal question, of universal importance under the Federal Administrative Procedure Act, * * *". The remand to the Court of Appeals prayed for would undo that situation and afford such an opportunity. The *per curiam* order of February 27, 1956 (350 U. S. 962), responsive in part to that prayer, granted the remand prayed for. The case has now ripened into a final judgment terminating the entire litigation; and it is before this Court on a petition for certiorari. A federal question of transcendent importance is squarely and timely presented.

* * * *

Replying briefly to respondents' argument on the merits as to the admissibility of Exhibit "7": First, respondent scrambles together the separate function of "Public Information" and "Rule Making", as though they were indistinguishable. Both are integral parts of the Administrative Procedure Act (Senate Document No. 248, 79th Con-

gress, pp. 193-195). Publication in Federal Register of a substantive rule 30 days before its effective date is not merely a public information requirement. It is a *sine qua non* to the existence of valid federal regulation (5 U. S. C. 1003(c). The footnote on page 13 of respondents' brief, quoting from page 415 of Senate Document No. 248 is a sample of respondents' confusion. That quotation refers solely to "organization" *of* agencies and "procedure" *before* agencies—not to the rule making process. It deals with the adjectival aspects—with practice before agencies. *Constructive notice* can have nothing to do with the question whether an administrative regulation (purporting to have the force and effect of law) ever came into existence under the Administrative Procedure Act. The relation of constructive notice to the rule making process erected by the Act is soundly stated in *Hotch* v. *U. S.*, 212 F. 2d 280.

But respondents' main reliance seems to be upon the doctrine of incorporation by reference (Brief pp. 9-12), viz., that the Federal Register incorporated by reference the Airmans Guide and thus complied with the notice of intention to adopt a regulation (plus opportunity to be heard) as well as with the enactment of the definitive rule. The application of the doctrine of incorporation by reference to the rule making process, with all its safeguards so carefully constructed by the Administrative Procedure Act, would not only be contrary to its plain words; it would, indeed, emasculate the most important piece of procedural legislation enacted within our memory; legislation which the late Mr. Justice JACKSON, writing for a unanimous court, said "created safeguards even narrower than the constitutional ones against arbitrary official encroachment upon private rights" *U. S.* v. *Morton Salt,* 338 U. S. 632, 644 (1950).

• • • •

In reply to pages 14-20 of the brief in opposition, petitioner's position in its second reason for granting the writ (Pet. pp. 29-36) does *not* involve a review of questions of fact, nor a reappraisal of the evidence, as respondent would have the Court believe. It presents the simple question of law whether on this record the trial court abused its discretion in refusing to set aside the verdict. None of the facts upon which it rests is in dispute. It may be a convenience to recall that the more outstanding features of the record, viz., (1) the District Judge and the jury made exactly contradictory findings on the *same* evidence, from the *same* witnesses, on the same record; (2) accepting the testimony of Bridoux (the Bolivian pilot) as it was given no rational human being could say (as the jury said) that he was innocent of fault; (3) the jury exonerated Bridoux, and held Eastern.

These features alone demonstrate an abuse of judicial discretion in the court's refusal to use the corrective power inherent in the grant of a new trial. This Court cannot be as powerless as respondents say it is.

* * * *

One further point will bear brief comment. Respondent complains, harshly, (Brief footnote 1, pp. 4-5; p. 16) of petitioner's statement that if the jury had found the Eastern plane clear to land the other allegations of fault became minor, trifling and nugatory, under the law as charged by the trial court. That statement is squarely and solidly grounded upon the undisputable language of the printed record. It will be remembered that respondents *stipulated* in the pre-trial order that the DC-4 was on *final approach,* at an altitude of 300 feet, when it was struck (I JA 22). An airplane on final approach has the right of way, and is required to maintain its course and

speed[2] (Id.). Grounded on this clear rule of air traffic, and upon the conceded duties of the control tower, the trial court charged that if the DC-4 was clear to land it was "entitled to assume that no other plane has been cleared to land on the same runway at the same time, and that all other craft in the control zone have been properly separated by the tower and do not constitute a collision hazard to it" (X JA 2111). And furthermore that if the DC-4, once cleared to land, "saw or should have seen the P-38" on its downwind or base leg was not required "to change its course," unless it actually knew or should have actually known that the P-38 constituted a collision hazard (X JA 2110-2111). It was entitled to rely upon the clearance which it had received from the tower, and was entitled to expect that the tower would do its duty and separate the planes. And especially is the court's attention directed to that part of the trial judge's charge in which he said "* * * and if you find that to be a fact (viz. that the DC-4 was clear to land) * * * then the plaintiff's allegation of negligence in this respect falls, *because* * * * *the Eastern airliner would be in the place where it was permitted to be at the time in question.*" (X JA 2111-2112, our italics).

Thus it is an uncontrovertible record fact, based upon the stipulation that the DC-4 was on final approach when she was struck, and under the law is charged if the jury

[2] The Air Traffic Rules then in effect were published in the 1949 Edition of the Code of Federal Regulations, 14 C. F. R. Part 60. 14 C. F. R. 60.14(e) provided "Aircraft while on final approach to land, or while landing, have the right of way over other aircraft * * *."; and the "*Right-of-Way*" rule (14 C. F. R. 60.14) provided that all other aircraft shall "keep out of the way" of the craft having the right of way; and that an aircraft having the right of way "will normally maintain its course and speed, * * *". The Air Traffic Rules presently in effect are found in 14 C. F. R. Part 60, 1953 Edition, as supplemented.

found the DC-4 had been cleared to land, all other allegations of fault went by the board in the posture in which the case was submitted to the jury.

CONCLUSION

The Petition for Certiorari to the United States Court of Appeals for the District of Columbia should be granted.

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